TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 648

THE UNITED STATES OF AMERICA, CINCINNATI AND COLUMBUS TRACTION COMPANY, AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK AND WESTERN RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

FILED MAY 11, 1912.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 1133.

THE UNITED STATES OF AMERICA, CINCINNATI AND COLUMBUS TRACTION COMPANY, AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK AND WESTERN RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

INDEX.

a United States Commerce Court.

No. 60.

The Baltimore & Ohio Southwestern Railroad Company and The Norfolk & Western Railway Company, *Petitioners*,
vs.
The United States of America and The Cincinnati & Columbus Traction Company, *Respondents*,
Interstate Commerce Commission, *Intervener*.

UNITED STATES OF AMERICA, *ss:*

Be it remembered that in the United States Commerce Court, in the City of Washington, District of Columbia, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Petition.
Filed January 22, 1912.

1 In the United States Commerce Court.

In equity.

The Baltimore & Ohio Southwestern Railroad Company and The Norfolk & Western Railway Company, *Petitioners*,
vs.
The United States of America and The Cincinnati & Columbus Traction Company, *Respondents*.

To the Honorable Judges of the United States Commerce Court:

The petitioner, The Baltimore & Ohio Southwestern Railroad Company, is, and at all the times hereinafter stated was, a consolidated corporation organized under the laws of Ohio and Indiana, and operating a line of railway extending through and across said States, and into and through the State of Illinois, and into the State of Kentucky. The line of said petitioner extends to Hillsboro,
2 in Highland county, Ohio, and into and through the counties of Highland, Brown, Clermont, and Hamilton in said State, and the municipalities of Hillsboro, Blanchester, Loveland, Madeira, Madisonville, Norwood, Cincinnati, and other municipalities in said counties, and has been maintained and operated by said petitioner and its predecessors in title into and through said places continuously at all times for sixty years.

The petitioner, The Norfolk & Western Railway Company, is a corporation organized under the laws of Virginia, operating a line of railway extending through parts of the States of Ohio, West Virginia, Kentucky, Virginia, Maryland, North Carolina, and Tennessee, and to and into and across, among others, the counties of Highland, Brown, Clermont, and Hamilton, in Ohio, and into and through the municipal corporations of Hillsboro, Sardinia, Mt. Orab, Williamsburg, Batavia, Cincinnati, and other municipalities in said counties,

said line of railway having been maintained and operated by petitioner and its predecessors in title into and through said places continuously at all times for about thirty years.

Both of said petitioners were and are incorporated and operated as steam railroad companies, engaged in the business of interstate commerce in the carriage of passengers and property between points on their own lines and points on the lines of other steam railroad companies with which they connect in the above named States,
3 said commerce extending throughout the United States and elsewhere.

Said petitioners now have, and at all the times hereinafter stated have had, tariffs filed as provided by law with the Interstate Commerce Commission, and posted and published as the law requires, prescribing rates for the transaction of their business of interstate commerce, and have been and are subject to all the laws and to all the rules and regulations prescribed by Congress or the Interstate Commerce Commission with respect to the operation and maintenance of their roads.

The Cincinnati & Columbus Traction Company is a corporation, organized under the laws of Ohio in the year 1901 as an electric railway, for the transaction of business between points in said State, and does not now do, and never has done, business in the nature of interstate commerce, and is not and never was a carrier of such commerce. Not until subsequent to the report of the Interstate Commerce Commission hereinafter referred to did the said Traction Company file with said Commission any schedule of rates, or otherwise attempt to qualify to conduct interstate business.

The line of railway of the Traction Company extends from Norwood, in Hamilton county, through and across the counties of Hamilton, Clermont, and Brown to and into the city of Hillsboro, in Highland county, Ohio. Its line of railway did not at the time of the filing of its complaint with the Interstate Commerce Com-
4 mission, as hereinafter recited, or at the time of the notice given on November 12, 1908, to which reference is hereinafter made, cross or intersect or connect with the line of road of either petitioner, nor has the same at any time since said date crossed, intersected or connected with the line of railway of either of the petitioners; but the same from Norwood to Hillsboro lies and extends between the lines of these petitioners, and serves the same persons, municipalities, and communities that are served by these petitioners.

The lines of the petitioners and of the said Traction Company and many of the features of the territory which they traverse are correctly shown on the blueprint diagram herewith filed as Exhibit No. 1 and prayed to be read as a part hereof.

On November 12, 1908, said Traction Company served written notice on each of the petitioners, demanding that they establish or permit to be established track connections and joint rates for the interchange of interstate traffic.

Said Traction Company did not at any time prior to the announcement by the Commission of its report hereinafter noted make any other or further demand for such track connections, save by instituting and carrying on its proceeding before the Commission.

Afterwards, on the 21st day of January, 1909, said Traction Company filed its petition with the Interstate Commerce Commission against petitioners and The Cincinnati, Lebanon and Northern Railway Company, which was docketed by the Commission as case No. 2062, praying that petitioners be required to establish with it track connections and through routes and joint rates for the transportation of interstate commerce, and be required to exchange with it cars and other equipment.

Petitioners filed their answers to said complaint and evidence was taken and the hearing concluded on October 30, 1909. Afterwards said Traction Company asked said Commission to allow the case to be reopened, which was done, and, March 21, 1910, on further hearing, it filed in said proceeding the written consent of one Harvey Anderson, a merchant of Marathon, located at a station on the line of said Traction Company, that his name might be used as an additional complainant in the said proceeding, and also then filed the written consent of the Central Lumber Company, per George Cooper, lumber merchant of Hillsboro, for the use of its name in the same manner; but neither said Harvey Anderson nor said Central Lumber Company nor said George Cooper at any time made application to petitioners, or either of them, to construct, maintain or operate a switch connection with the line of said Traction Company, or that they exchange business or equipment with said company; nor have the said parties, or any of them, ever done anything, except as hereinbefore recited, in the way of requesting anything of petitioners with respect to the transaction of interstate business. There was no evidence offered in the proceeding before the Commission as to the extent of the interstate business of said Harvey Anderson or said Central Lumber Company or said George Cooper, and nothing whatever was offered to show whether the income therefrom, assuming its existence to any extent, would be sufficient to bring any net revenue whatever to petitioners or either of them for the services expected to be rendered by them, or to show that the revenue would be sufficient to reimburse petitioners the expense to which they would be put on account of a track connection or the maintenance thereof or the filing of tariffs with respect to the interstate business of said parties.

Afterwards, on March 14, 1911, the Interstate Commerce Commission made a report in said proceeding, a copy of which is herewith filed, marked Exhibit No. 2, and prayed to be read as a part hereof, in which the Commission expressed the opinion that the said Traction Company is entitled to a switch connection with the line of the petitioner, the Baltimore & Ohio Southwestern Railroad Company, at Madeira, a point shown on the diagram aforesaid, and to a switch connection at or near Hillsboro, another point shown on said dia-

gram, with the lines of both petitioners, and that the petitioners should unite with the said Traction Company in establishing through routes for the movement of interstate traffic. Thereafter, on
7 the 13th day of December, 1911, the Commission made an order in the said proceeding, as follows:

"This case coming on to be further considered, and it appearing that the parties in interest have failed to put in effect the findings made by this Commission in its report herein, dated March 14, 1911, and that the above-named complainant petitions by counsel for an order of relief in the premises:

"It is ordered that defendant The Baltimore & Ohio Southwestern Railroad Company be, and it is hereby notified and required to construct, on or before the 15th day of February, 1912, and thereafter to maintain and operate during a period of not less than two years, a switch connection for the transfer of interstate traffic to and from the line of the above-named complainant company at Madeira, Ohio, the expense of installing such connection to be borne by said complainant.

"It is further ordered that said defendant The Baltimore & Ohio Southwestern Railroad Company be, and it is hereby, notified and required to construct, on or before the 15th day of February, 1912, and thereafter to maintain and operate during a period of not less than two years, a switch connection for the transfer of interstate traffic to and from the line of the above-named complainant company at, or near, Hillsboro, Ohio, the expense of installing such connection to be borne by said complainant.

"It is further ordered that defendant Norfolk & Western
8 Railway Company be, and it is hereby notified and required to construct, on or before the 15th day of February, 1912, and thereafter to maintain and operate during a period of not less than two years, a switch connection for the transfer of interstate traffic to and from the lines of the above-named complainant company at, or near, Hillsboro, Ohio, the expense of installing such connection to be borne by said complainant.

"And it is further ordered that defendants The Baltimore & Ohio Southwestern Railroad Company and Norfolk & Western Railway Company, according as their various lines may run, be, and they are hereby, notified and required to establish and put in force, on or before the 15th day of February, 1912, and for a period of at least two years thereafter to maintain, through routes to and from interstate points to and from all points on the complainant's line between and including Boston and Dodsonville, in the State of Ohio, in order that shippers at and between those points may have access to and from interstate points by interchange of cars under through billing and through charges based upon the rates of the respective carriers herein to and from the junction points established by this order, the complainant carrier having filed its local rates with this Commission as applicable to interstate movements over such through routes."

Petitioner, the Baltimore & Ohio Southwestern Railroad Company, avers it to be a fact, which was not controverted in the
9 said proceeding, that the contour of the country at Madeira is such that in order to make a track connection between its lines and the line of the Cincinnati and Columbus Traction Company on which cars could be interchanged, it would be necessary that the same be laid to a large extent upon property between the right of way occupied by the line of the Traction Company and that occupied by the line of the said petitioner, there being no other reasonably practicable method of making such connection, and said petitioner does not own at said place any right of way or property beyond the line of that used for its own tracks which could be availed of for such connection across the intermediate territory.

Petitioners aver that because of the facts hereinbefore and hereinafter alleged, all of which were brought to the attention of the Commission in said proceeding, and which facts, all and singular, are now relied on as the basis for the relief herein sought, said order is invalid and should be enjoined and wholly set aside and annulled, for the reasons now to be stated:

1. Said Traction Company has no right or authority under the law of the State of Ohio, pursuant to which it was incorporated and is operating, to have its tracks connected with those of the petitioners, or either of them. It is controlled by the law of that State applicable to electric railways, and not by the law applicable to steam
10 railways such as those owned by these petitioners. It is an interurban enterprise, designated as a street railroad as distinguished from a steam railroad, and admittedly restricted and confined to the use of electric power, both by law and by prohibitions in the deeds and licenses pertaining to its roadbed and operation, and is therefore in an entirely different class from that to which petitioners belong. The said Traction Company is regulated in a different manner from petitioners in respect to fencing, gates, clearances, highway crossings, occupation of streets, liability for injury to employees, track elevation, track connection, and interchange of business and equipment, and in respect to other material matters. The absence of any relation of the said Traction Company to interstate commerce or business was and is as hereinbefore stated.

2. The said Traction Company is not and never has been such a lateral branch line of railroad as is contemplated by and described in the provision of the Act to Regulate Commerce relative to such track connections as were prayed for in the said proceeding and are prescribed by said order, and the said order is an attempted exercise by the Commission of powers which it does not possess.

3. At the time the said proceeding was filed by the said Traction Company there was no statutory provision authorizing the Commission to entertain it, and at no time thereafter was an appli-
11 cation in writing made to petitioners, or either of them, by said Traction Company or by any other person, to install and operate a track connection with the line of the said Traction Com-

pany, and thus the Commission's jurisdiction to make the said order, if it otherwise existed, was not invoked in the manner provided by the statute.

4. Said order is dictated by a purpose to require, and does require, petitioners, and each of them, to interchange equipment with the said Traction Company, when the track connections thereby prescribed have been made. The Commission is without constitutional power to make or impose or take any step towards imposing such requirement on petitioners, since the fifth amendment to the Constitution guarantees them, and each of them, such ownership and use of their property as would be invaded and taken away by a compulsory interchange of equipment, and further, since there is no statutory provision under which they are or can be compensated for the loss of such ownership and use as is incident to the interchange of equipment between carriers, and particularly in cases where one of the carriers is not in a position to engage in the proposed interchange, which is true of the said Traction Company, for the uncontradicted evidence before the Commission in the said proceeding was to the
12 effect that the said Company does not own or possess locomotive engines and cars of sufficient size, strength, and fitness to be operated on and over the lines of petitioners, or either of them, and it is a fact that it has never at any time since November 12, 1908, owned or possessed any such engines or cars. Further, petitioners aver that said Traction Company has supplied itself with no more equipment of any kind than necessary for conducting the business on its own line, and with any other line with which it may now connect; and should petitioners, or either of them, be required to place their equipment on the line of the Traction Company and the lines of other carriers similarly situated, petitioners would not, nor would either of them, be able to retain upon their own lines sufficient equipment to supply the demands of their own business.

5. The uncontradicted evidence before the Commission was to the effect, and it is the fact, that the curves on the line of the Traction Company in the town of Madisonville, which is shown on the aforesaid diagram, are such as to prohibit the operation of a freight car or cars herein without disregard of the safety-appliance law, and that at Milford, another place shown on the said diagram, the clearance between the said company's roadbed and the bridge of the Pennsylvania road, which crosses the company's line at that point, is so limited as to render dangerous the operation of ordinary freight cars such as are used by petitioners. The said order could not have been
13 made and cannot be enforced without a disregard of these practical difficulties which involve, to say the least, the safety of those who may be engaged in the operation of ordinary freight cars over the said company's line in the event of the enforcement of the order.

6. There was strong and impressive evidence introduced in the said proceeding showing that, on account of the physical condition of the said Traction Company's roadbed, the operation of loaded

freight cars, such as those used by petitioners, over that company's lines, would be highly unsafe both to persons and to property, and petitioners believe and aver that the conditions in that respect have not changed for the better since the introduction of such evidence. The Commission, in its report, said:

"But whatever may be the facts with respect to all the details of that nature referred to in the record, we assume that the self-interest of the complainant will be sufficient to lead it to make the necessary arrangements so to conduct its operations as to be able to move traffic over its line with safety. This we think it can do, and this we doubt not it will do. We attach no importance therefore to the suggestion that the cars of the defendants will not be safe on the line of the complainant or to the suggestion that if an order is entered requiring the defendants to join in through routes and through rates with the complainant an undue burden will be
14 placed upon them under the so-called Carmack amendment to the act, because of the condition of the complainant's roadbed and bridges."

Petitioners aver that they cannot be compelled, for the protection of their equipment and the traffic which may be loaded in their cars, to depend, nor can the employees of either of the petitioners or the Traction Company be compelled to depend for their protection, upon the uncertain action of the Traction Company as it may or may not be influenced by the promptings of self-interest. Petitioners aver that, if forced to execute the said order, and allow their equipment to be operated over the line of the Traction Company, they will thereby and otherwise be in danger of sustaining frequent and serious losses for which there is no assurance whatever that they will receive compensation, and thus will stand in peril of being subjected to irreparable injury. Petitioners aver that they, as initial carriers issuing bills of lading over through routes, will be liable, under the provisions of section 20 of the Act to Regulate Commerce as amended June 29, 1906, known as the Carmack amendment, for any loss, damage or injury to freight caused by the Traction Company; and petitioners will be relegated for protection to an action over against the Traction Company, and in this, as in the other ways herein set forth, petitioners will be subjected to irreparable injury. As hereinafter stated, the financial condition of the Traction Company does not inspire confidence in its ability to
15 respond to even moderate demands for which it might become liable should its self-interest not induce it to make its roadbed entirely secure for the transportation of property and persons.

7. The earnings of the said Traction Company at the time the evidence was introduced in the said proceedings before the Commision were insufficient to pay its operating expenses, and it was then not only heavily mortgaged but involved in, or threatened with, litigation in respect to certain liabilities asserted against it. Its accounts showed a deficit, and there was a possibility of claims against it for a considerable amount being reduced to judgment.

Petitioners aver and believe that there has since been no material improvement in the financial condition of said company, and they should not be made to enter into traffic arrangements, in the manner proposed by the said order, with a railway corporation which is not in a position to save harmless petitioners from the consequences of the grave responsibilities which the petitioners will inevitably be called on to assume by complying with said order.

8. In its report the Commission frankly states that its conclusions are based more largely upon its own investigations than upon the testimony of witnesses who testified in the said proceeding. The petitioners were not advised of and do not know what investigations are referred to, or when or by whom they were made, but they aver that, in basing conclusions upon such investigations, instead of upon the evidence introduced in the said proceeding, the Commission exceeded its authority.

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In view of the premises petitioners pray that the aforesaid order of the Interstate Commerce Commission may be finally enjoined and wholly set aside and annulled; that preliminary or interlocutory injunctions may be awarded suspending the operation of the said order for such period or periods as may be deemed requisite, and that they may have such other, further, and full relief as the case requires.

An to this end petitioners pray that the United States of America and The Cincinnati & Columbus Traction Company may be made parties respondent hereto and required to answer the allegations of this petition, an answer by them, or either of them, under oath, being waived.

And, as in duty bound, petitioners will ever pray, etc.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
By EDWARD BARTON, *Counsel.*
THE NORFOLK & WESTERN RAILWAY COMPANY,
By JOSEPH I. DORAN,
THEODORE W. REATH,
R. WALTON MOORE, *Counsel.*

17

EXHIBIT NO. 2.

Report of the Commission.

HARLAN, *Commissioner:*

The complainant company was organized in 1901 under the laws of the State of Ohio, with charter power to build and operate an electric railroad from Columbus to Cincinnati. The line as actually constructed in 1905 reaches neither of these points, but extends from Norwood, a suburb of Cincinnati, to Hillsboro, a distance of some 53 miles; it lies wholly within the State of Ohio and belongs to the class of roads commonly referred to as interurban roads. It is before us praying for an order requiring the defendants "to establish connections and joint rates for the interchange of interstate traffic."

MAPS

TOO

LARGE

FOR

FILMING

Besides contesting the issue on the general merits the defendants have interposed one or two objections of a technical nature that must first have consideration:

1. The legal right of the complainant to demand a physical connection with the defendants is questioned. Decisions of the Supreme Court of Ohio are cited to show that interurban electric railways are classified in that State as street railways, and are controlled by other statutes than those relating to steam railways. With respect to the matter of fences, gates, crossings, clearances, liability to employees, and track elevation, the requirements imposed on electric lines under the local laws are said to differ materially from those imposed on steam roads. The State courts, as we are advised, have definitely held that the laws relating to steam railroads are not to be understood as being applicable to electrically operated road unless that intention expressly appears. One statute to which special reference is made contains a provision as follows:

"Steam railroad companies as between themselves, and in-
18 terurban and electric railroads as between themselves, shall afford reasonable and proper facilities for interchange of traffic between their respective lines, for forwarding and delivering passengers and property, and shall transfer and deliver without unreasonable delay or discrimination car, loaded or empty, freight or passenger, destined to a point on its own or connecting lines."

The defendants contend that under this provision the complainant, being an interurban and an electrically operated line, is expressly precluded from demanding a track connection with either of the defendant steam lines and is also precluded from demanding an interchange with them of equipment and traffic. But under the laws of Ohio the complainant seems to be a common carrier of persons and property and is actually engaged in the transportation of both classes of traffic. It also carries express matter. On its line are shippers and towns that desire, in addition to its local service, access to and from interstate points on the public highways operated by the defendants; and in this proceeding we are asked to open these highways to their interstate traffic by requiring the defendants to connect their lines with the line of the complainant and to establish with it through routes and point rates. Under the act to regulate commerce as amended express power is given us to grant such relief. If therefore the facts and conditions are such as to warrant an order to that effect, we think we need not look beyond that act for any limitation upon our authority to enter it. A local law under which an electrically operated railway may have no right to demand a switch-track connection and interchange of traffic with a steam railway may be controlling in so far as it relates to traffic moving wholly within the State; but it cannot be permitted to operate as an impediment to the movement of interstate traffic after the Congress has legislated upon the subject by specifying the grounds upon which interstate shippers may demand such connections and interchange of

traffic. The general principles underlying this conclusion are well understood and have so often been enforced by the courts that the citation of authorities seems not to be required.

19 2. It is also contended that the proper parties complainant are not before us, and that we are therefore without jurisdiction to order the relief asked. The petitioner made application to the defendants for a switch-track connection and, being refused, instituted this proceeding upon its own complaint. During the pendency of the proceeding the Supreme Court of the United States in *Interstate Commerce Commission vs. D., L. & W. R. R. Co.*, 216 U. S., 531, held that section 1 of the act as it then appeared on the statute books not only required the application for a switch-track connection to be made by a shipper, but gave us authority to act only upon complaint by a shipper. To avoid the possibility of having its complaint dismissed on this ground, the petitioner, at a subsequent hearing, filed with the Commission two letters addressed to the complainant, one by a genral merchant at Marathon, and the other on behalf of a lumber company at Hillsboro, both being points on the line of the complainant. As they are of similar import, it will suffice to reproduce but one of them here:

"MARATHON, OHIO, *March 21, 1910.*

"*The Cincinnati & Columbus Traction Co., Norwood, Ohio:*

"GENTLEMEN: I beg to advise that your attorney, C. B. Matthews, may use my name as the coplaintiff in your suit before the Interstate Commerce Commission in reference to interchange of freight and cars. In fact, I will do almost anything to help your company in its proceedings in this suit, as it will greatly benefit me and the community at large.

"Wishing you success and trusting this will be satisfactory, I remain,

"Respectfully yours,

"H. ANDERSON,

"*General Merchandise Merchant, Marathon, Ohio.*"

The writers of these letters had given testimony tending to support the general allegations of the complaint. An application that they be made cocomplainants, prepared by the attorney of the com-

20 plainant on the authority of these letters, is also of record. To this application the defendants objected, insisting, one of them perhaps more strongly than the other, that the letters and application can not be regarded as having the force and effect of making the two shippers co-complainants in the proceeding. They also contend that no application in writing for a switch-track connection has been made by these shippers to either of the defendants; and that the petition must therefore be dismissed on the authority of the case above cited.

In the general public interest the Commission has endeavored to simplify its practice and procedure and to perform its functions in a practical way, without permitting merely technical matters to inter-

fere unduly with substantial results. In *Missouri & Kansas Shippers Asso. vs. M., K. & T. Ry. Co.*, 12 I. C. C. Rep., 483, 484, we said:

"While its procedure is to some extent judicial in nature, the Commission is essentially an administrative body; and in the adjustment of contentious proceedings of this kind it ought to examine into the real substance of the matter unembarrassed by considerations that are purely technical."

The letters of these two shippers, in connection with their testimony and their petition to be made cocomplainants, seem to us not only sufficient for all practical purposes to bring them before us as cocomplainants and to serve as their application in writing for a switch-track connection, but sufficient to give the defendants full notice and to advise the Commission of their interest in the questions at issue. On the other hand, the testimony offered by the defendants seems to cover the entire ground, and in making these objections it is not suggested that any additional testimony is required by the presence on the record of these two shippers as cocomplainants or that further testimony is in fact available. There was also abundant opportunity during the months that intervened between the closing of the record and the oral argument to have offered additional testimony. Under such circumstances, to take a technical view of the state of the
21 record would be inconsistent with our general practice of getting at the substance of things when possible; and, inasmuch as the whole situation is fully disclosed and we are in a position to protect the legal and substantial rights of all the parties in interest, we think we may fairly find, as we do, that the necessary parties complainant are before us and that all the requirements of the act, in order to give us jurisdiction of the subject-matter, have been observed. Moreover, if the record when closed was defective on these grounds the defect may be held to have been cured by the recent amendment to the act, that became effective before the case was argued and submitted, and which specifically permits complaints of this character to be entertained when filed by the "owner of such lateral branch line of railroad."

Coming now to the merits, the first inquiry is whether a switch connection, using the language of the act, "is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same." On this point we think the record leaves no room for doubt. A physical connection with the defendant, the Baltimore & Ohio Southwestern, at one time existed at Madeira and also at a point spoken of in the record as Hillsboro Junction. At the same time there was also a connection with the line of the Norfolk & Western at the latter point. They were put in when the line of the complainant was under construction, and were removed after its completion, apparently in accordance with a previous understanding to that effect. It is not to be doubted that it is reasonably practicable to restore these connections at those points or to put connections in elsewhere, or that when restored or put in elsewhere they can be operated with safety. Nor

can it be doubted that there will be sufficient traffic to and from points on the line of the complainant reasonably to compensate the defendants for constructing, maintaining, and operating such switch connections with the complainant.

The complainant also demands, as we understand the petition, through routes and joint rates to and from all interstate points reached by the defendant lines and their connections. When
22 the complaint was filed the Commission, under section 15, had authority, after hearing on a complaint, to establish through routes and maximum joint rates and to prescribe the divisions thereof, "provided no reasonable or satisfactory through route" existed. In the amendment of June 18, 1910, this limitation was omitted. As the section now reads, the only limitations on our authority to establish through routes and joint rates that need be mentioned here are: (*a*) We may not require any railroad involuntarily to embrace in a through route substantially less than the entire length of its road between the *termini* of the proposed through route. (*b*) We may not establish through routes and joint rates between a steam railroad and a street electric passenger railway that does not transport freight in addition to its passenger and express business. The first of these limitations must, of course, be observed in all cases; the second has no application in connection with this complaint.

This is the first occasion upon formal complaint that we have had to examine the amended provision. But one point that seems to be entirely clear is that, although the complaint was filed before the amendment became effective, we can act only under the authority that we now have. We gather also from a careful reading of the amended clause that it was the purpose of the Congress to widen the scope of our powers to establish through routes and joint rates rather than to narrow them, and to leave in the Commission full discretion to act in such cases in the light of all the facts and circumstances and according to what may seem wise, fair, reasonable and equitable in each case. We shall dispose of this complaint with that understanding of the extent of our authority.

For a distance of about six miles eastwardly from Norwood the line of the complainant not only parallels the line of the Baltimore & Ohio Southwestern but practically adjoins the right of way of that defendant. A few miles farther to the east it approaches and at Perintown practically adjoins the right of way of the Norfolk & Western and parallels that road for a few miles to Stonelick, at which point it is only about a mile distant from the Norfolk
23 & Western. Its station at Norwood also immediately adjoins the stations of the defendants, the Baltimore & Ohio Southwestern and the Cincinnati, Lebanon & Northern Railway Company. For a distance of some four or five miles out of Hillsboro, its eastern terminus, the complainant's line again parallels the tracks of the Baltimore & Ohio Southwestern, the rights of way of the two lines being immediately adjoining. It was at a point about a mile and a

quarter west of Hillsboro that the line of the complainant was formerly connected by a switch track with the line of the Baltimore & Ohio Southwestern and also with the line of the Norfolk & Western. On that end of the line are the villages of Hoagland, Fairview, and Allensburgh, which are, respectively, a mile and a half, one mile, and three miles distant from a station on the line of the Baltimore & Ohio Southwestern, but much more distant from any station on the Norfolk & Western. They are small communities with no commercial enterprises of such character that they may be said not to be reasonably well served at this time, so far as interstate shipments are concerned, by the Baltimore & Ohio Southwestern. Among all the witnesses that testified none resided at any of these places, and therefore the record discloses no complaint of inadequate transportation facilities at these points or the need of additional facilities. At the western end of the line are Madisonville, Madeira, Milford, Perintown, Stonelick, and Boston, some of which are practically within a stone throw either of the Baltimore & Ohio Southwestern or the Norfolk & Western. Boston, the most distant of the points last mentioned, is about five miles by the country roads from Batavia and something less from Baldwin, stations on the Norfolk & Western; it is not less than eight miles from the nearest station on the tracks of the Baltimore & Ohio Southwestern. Dodsonville, toward the eastern end of the complainant's line, is also four or five miles distant by wagon road from any station on the Baltimore & Ohio Southwestern and as much as eight miles from the nearest station on the Norfolk & Western. Between that point on the east
24 and Boston on the west are a number of towns and villages that are located from about five miles to as much as ten or twelve miles by wagon road from the nearest stations on the lines of one or the other of the defendants.

Under the principles announced in *Chicago & Milwaukee Electric R. R. Co. vs. I. C. C. R. R. Co.*, 13 I. C. C. Rep., 20, we would not open through routes and establish joint rates for Norwood or Hillsboro because both places now reach all interstate points over each of the defendant lines. Moreover, through routes and joint rates between interstate points and Norwood and Hillsboro, in connection with the complainant's line, could not lawfully be required under the terms of section 15 of the act as lately amended. Nor should we open through routes and establish joint rates between interstate points and Madisonville, Madeira, or Hoagland over the complainant's line in connection with the Baltimore & Ohio Southwestern, because those points are already served by the latter line. Nor should we under the views announced in that case open through routes and joint rates to and from Fairview, Allensburgh, Milford, Perintown, and Stonelick, all those points being within a short and reasonably convenient distance of stations on one or the other of the defendant lines. On the other hand, under the disposition made of a similar complaint in *Cedar Rapids & Iowa City Ry. & Light Co. v. C. & N. W. Ry. Co.*, 13 I. C. C. Rep., 250, we are of the opinion that the defendants may

properly be required to join with the complainant in opening through routes and establishing joint rates between interstate points and Boston, Monterey, Hartman, Marathon, Quinns Crossing, Vera Cruz, Fayetteville, St. Martins, Stringtown, and Dodsonville. None of these towns is within less than approximately five miles, and two or three are ten miles or more by the country roads from any station on the defendant lines. To say that such places are already reasonably well served by either of the defendants is to announce the definite proposition that a wagon haul of from five to ten miles is not an improper burden to put upon an interstate shipper. But in such a view we are not ready to concur as a fixed rule, even
25 when the country roads are so good as the roads in this territory are said to be. While we have little sympathy with, and will not ordinarily lend our aid to, an effort by one road to secure traffic that is reasonably tributary to another road by compelling the latter to join with it in through routes and rates, we shall not permit the theory as to what traffic is tributary to a road to be pushed to such an extreme as to impose an undue burden upon shippers. Confining our ruling to the special facts of the case and to the points last mentioned, we think the prayer for through routes should be granted.

But besides contending that the country traversed by the line of the complainant has been adequately served by one defendant for not less than 50 years and by the other for not less than 25 years, the defendants also assert that the combined traffic to and from this territory is very light, and that the little revenue received from it ought not to be taken from them by a line that should never have been built; that, considering the transportation requirements of this district and the facilities offered by the defendants, the complainant's line is one that would not have been allowed to be constructed under a system of laws, prevailing in some of the States, that requires previous official sanction when a railroad enterprise is proposed and a line laid out; and that "one of the questions involved is whether the owners of a line of railway thus unwisely projected and built can demand a division with the older lines at their expense and without any compensating advantage to the community in general traversed by the several lines." In this connection the defendants state that no dividends have ever been paid on the outstanding stock of the complainant company; that its line is operated at a heavy annual deficit, and that it is not earning even operating expenses, but is approaching bankruptcy. Figures are also given purporting to show that the freight rates on the lines of the defendant railroads to the territory in this vicinity produce "not more than 1.3 per cent profit on the investment." Excluding Hillsboro and Greenfield, the general district has lost both in wealth and population since 1860. It is said, gen-
26 erally speaking, to be an infertile and very poor farming country, not producing enough grain and feed to supply the local demand. And most of the lumber, it seems, has been cleared off.

The defendants object to through routes and joint rates with the complainant on still other grounds. It is insisted that its right of

way is unfit for the operation of such trains as are used on the regular lines. Referring to the matter of ballast, the line of the complainant is said to be a "one coat" road and without any ballast in some places, while in others the fills have been much washed. We are also told that the bridges in some cases have no sufficient margin of safety and are largely made from material discarded by the regular lines as second-hand stuff, to be sold and not used; that the trestles are subject to the same general criticism; that the grades are steep and the curves sharp; that while operation is possible it is thought to be dangerous; that such freight cars as the complainant has were purchased of the Cincinnati, Hamilton & Dayton from among those condemned as no longer fit for use on that line, and that if put upon either of the defendant lines would be "crushed like eggshells." Finally, it is said that the clearances on the complainant line are not such as are required by the local law of steam roads, although regular line equipment can get through; that for five miles the line runs on public streets, and that at Madisonville there are two curves so sharp that freight cars with standard couplers cannot make the turn, shackle bars being required. The right of way is from 20 to 60 feet wide, and at no place on complainant's line are there track scales. It has 9 box cars, 2 flat cars, 4 gondolas, and 1 stock car, and is therefore not in a position to exchange any equipment with the defendants or to furnish any equipment for joint use.

We think that much of this criticism as to the physical condition of the line of the complainant is the reflection of a special view in which the requirements of steam lines with respect to their roadbed and bridges were taken as a basis of comparison. Giving due weight to the testimony of witnesses on each side of the controversy,
27 but basing our conclusions more largely upon our own investigations, we think the complainant will have no difficulty in moving regular line equipment over its road. We do not understand that it is equipped for operating long freight trains. But whatever may be the facts with respect to all the details of that nature referred to in the record, we assume that the self-interest of the complainant will be sufficient to lead it to make the necessary arrangements so to conduct its operations as to be able to move traffic over its line with safety. This we think it can do, and this we doubt not it will do. We attach no importance therefore to the suggestion that the cars of the defendants will not be safe on the line of the complainant, or to the suggestion that if an order is entered requiring the defendants to join in through routes and through rates with the complainant an undue burden will be placed upon them under the so-called Carmack amendment to the act, because of the condition of the complainant's roadbed and bridges.

In conclusion we find that the complainant is entitled to a switch connection with the line of the defendant, the Baltimore & Ohio Southwestern Railroad Company, at Madeira, and to a switch connection at or near Hillsboro with the line of that defendant as well

as with the line of the Norfolk & Western Railway Company. We shall not here specify the exact points at which the connections are to be made. In case, however, the parties cannot promptly reach an agreement on that matter an order will be entered. We also find on the special facts of the case, as heretofore explained, that the record justifies an order requiring the defendants to join with the complainant in establishing through routes so that shippers on the line of the complainant at points between and including Boston on the west and Dodsonville on the east may have access to and from interstate points under through billing and through charges. The suggestion made on the brief of the complainant is that the joint rates, when established, ought not to be greater than the "maximum consisting of the present tariffs to Hillsboro and Madeira, respec-
28 tively, and the carload rates upon the complainant's line." Certainly this demand, as we understand it, is within reason from every point of view. We agree, however, with the defendants in saying that the case does not seem to justify putting them at the expense of reprinting their tariffs and getting the concurrence of their connections in new joint through rates to and from local points on the complainant's line. This may be avoided if the complainant will file its local rates with this Commission. This will make them applicable under our rules on through interstate movements.

As the complaint seems to have been abandoned by the petitioner so far as the Cincinnati, Lebanon & Northern Railway Company is concerned, we have not considered that line in reaching the conclusions herein expressed.

On the assumption that the parties will have no difficulty in carrying these findings into effect by agreement among themselves we shall enter no order at this time. Upon being advised of their failure to agree the necessary order will be entered.

29 *Notice to the Attorney General.*

Issued January 22, 1912.

In the United States Commerce Court.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
vs.
THE UNITED STATES OF AMERICA, AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS. } No. 60.

THE PRESIDENT OF THE UNITED STATES:

TO HONORABLE GEORGE W. WICKERSHAM AS ATTORNEY GENERAL OF THE UNITED STATES:

You are hereby notified that a petition has been filed in the above entitled case in the office of the Clerk of the United States Commerce

Court at Washington, D. C., copy of which is herewith served by filing said copy in the Department of Justice.

In case no answer shall be filed to said petition within thirty days after such service, the petitioner may apply to the Court on notice for such relief as may be proper upon the facts alleged in said petition.

Witness the Honorable Martin A. Knapp, Presiding Judge of the United States Commerce Court, this 22d day of January, A. D. 1912.

[SEAL.] G. F. SNYDER, *Clerk.*

Original of above notice and copy of petition served upon Honorable George W. Wickersham, Attorney General of the United States, this 22nd day of January, A. D. 1912. (Accepted for Blackburn Esterline by Mrs. B. M. Power.)

F. J. STAREK,
Marshal.
By JAMES L. MURPHY,
Deputy Marshal.

30 *Notice to the Chairman of the Interstate Commerce Commission.*

Issued January 22, 1912.

In the United States Commerce Court.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS, *vs.* THE UNITED STATES OF AMERICA, AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS.	No. 60.

THE PRESIDENT OF THE UNITED STATES:

TO HON. CHARLES A. PROUTY AS CHAIRMAN OF THE INTERSTATE COMMERCE COMMISSION:

You are hereby notified that a petition has been filed in the above entitled case in the office of the Clerk of the United States Commerce Court at Washington, D. C., copy of which is herewith served by filing said copy in the office of the Secretary of the Interstate Commerce Commission.

In case no answer shall be filed to said petition within thirty days after such service, the petitioner may apply to the Court on notice for such relief as may be proper upon the facts alleged in said petition.

Witness the Honorable Martin A. Knapp, Presiding Judge of the United States Commerce Court, this 22d day of January, A. D. 1912.
[SEAL.] G. F. SNYDER, *Clerk*.

Original of above notice and copy of petition served upon Chas. A. Prouty, Chairman of the Interstate Commerce Commission, this 22nd day of January, A. D. 1912. (Accepted by C. H. Farrell.)

F. J. STAREK,
Marshal.
By JAMES L. MURPHY,
Deputy Marshal.

31 *Summons to the Cincinnati & Columbus Traction Company.*

Issued January 22, 1912.

In the United States Commerce Court.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
vs.
THE UNITED STATES OF AMERICA, AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS.
No. 60.

THE PRESIDENT OF THE UNITED STATES:

TO THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENT:

You are hereby summoned and required within thirty days after service hereof to appear and answer unto a petition filed in the above entitled case in the office of the Clerk of the United States Commerce Court at Washington, D. C., copy of which is herewith served upon you.

In case no answer shall be filed within the time named, the petitioner may apply to the Court on notice for such relief as may be proper upon the facts alleged in said petition.

Witness the Honorable Martin A. Knapp, Presiding Judge of the United States Commerce Court, this 22d day of January, A. D. 1912.
[SEAL.] G. F. SNYDER, *Clerk*.

Summons and copy of petition served upon The Cincinnati & Columbus Traction Company by posting same in the office of the Secretary of the Interstate Commerce Commission; copies of papers also sent to company at Norwood, Ohio, this 22d day of January, A. D. 1912.

F. J. STAREK,
Marshal.
By JAMES L. MURPHY,
Deputy Marshal.

32 *Appearance of Interstate Commerce Commission.*

Filed January 25, 1912.

In the United States Commerce Court.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS, *v.* THE UNITED STATES OF AMERICA, AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS.	No. 60.

To Mr. G. F. SNYDER, *Clerk, U. S. Commerce Court:*

I hereby enter herein the appearance of the Interstate Commerce Commission as a party respondent, and of myself as its solicitor.

CHAS. W. NEEDHAM,
Solicitor, Interstate Commerce Commission.

JANUARY 24, 1912.

33 *Appearance of Cincinnati & Columbus Traction Company.*

Filed January 31, 1912.

In the United States Commerce Court.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY *vs.* THE UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY.	No. 60. Entry of appearance of the Cincinnati & Columbus Traction Company.

The appearance of the Cincinnati and Columbus Traction Company party defendant, in the above entitled action, is hereby entered.

Dated at Cincinnati, Ohio, this 29th day of January, 1912.

THE CINCINNATI & COLUMBUS TRACTION COMPANY,
By C. B. MATTHEWS, *Its Atty.*

34 *Notice of motion for preliminary injunction, and acceptance of service thereof.*

Filed February 2, 1912.

In the United States Commerce Court.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY ET AL. *vs.* UNITED STATES OF AMERICA ET AL.	In Equity No. 60.

To THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, AND THE CINCINNATI & COLUMBUS TRACTION COMPANY:

Please take notice that at the opening of the session of the Commerce Court of the United States, at its court room, in the City of

Washington, on February 6, 1912, the undersigned will present a motion in the above entitled case for an interlocutory or preliminary injunction.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
NORFOLK & WESTERN RAILWAY COMPANY,
By EDWARD BARTON (by RWM),
THEODORE W. REATH "
R. WALTON MOORE,
Counsel.

Service of the foregoing notice is hereby accepted this the 25th day of January, 1912.

CHAS. W. NEEDHAM,
Sol. Interstate Commerce Commission.
BLACKBURN ESTERLINE,
For the United States.

Service of the foregoing notice is hereby accepted this the 29th day of January, 1912.

THE CIN. & COLUMBUS TRACTION CO.,
By C. B. MATTHEWS, *Its Atty.*

35 *Motion of United States to dismiss.*

Filed February 6, 1912.

In the United States Commerce Court.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS, *v.* THE UNITED STATES OF AMERICA, AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS.	No. 60.

MOTION OF THE UNITED STATES TO DISMISS THE PETITION.

The Attorney General of the United States, on behalf of the United States, moves the court to dismiss the petition on the ground that it does not set forth a cause of action, for the following reasons:

1. The claim that the commission had before it no valid demand for the establishment of the switch connection, is not sound in law.

2. The claim that even if the commission had before it no demand, it was still without power to make the order, is unsound in law.

3. The claim that the commission had no authority to require a switch connection with this electric railroad, is not sound in law.

36 4. The claim that the commission erred because the building of the required switch line would necessitate condemnation of some land by the petitioner, is not sound in law.

5. The claim that the order of the commission was unlawful in requiring interchange of equipment is not sound in law.

6. The claim that the commission's findings of fact on the question of whether the connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same should or can be set aside is unsound in law.

7. The claim that the commission had no power to supplement the testimony of witnesses by independent investigation of its own in reaching its conclusions of fact is unsound in law.

8. The claim that the commission's finding and conclusion in respect to the alleged threatened insolvency of the traction company can be set aside is unsound in law.

9. The claim that, irrespective of this finding, the fact would require the refusal of the switch connection is not sound in law.

10. The claim that the conclusions of policy and findings of fact of the commission can be set aside on any of the grounds alleged in the petition is unsound in law.

37 Wherefore and for other reasons appearing on the face of the petition, and because there is no equity in it, this respondent prays that its motion be sustained and that the said petition be dismissed at petitioner's cost, and that the respondent be not required to make any answer thereto; and for such other and further action as may be appropriate.

GEORGE W. WICKERSHAM,
Attorney General.

38 *Journal entry.*

Proceedings of February 7, 1912.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY ET AL., PETITIONERS,
vs.
THE UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS,
INTERSTATE COMMERCE COMMISSION, INTERVENER. } No. 60.

Said cause came on for further hearing upon the motion for preliminary injunction and the arguments of counsel were concluded, Mr. Charles W. Needham appearing on behalf of the Interstate Commerce Commission, Mr. Assistant Attorney General Denison on behalf of the United States, Mr. C. Bentley Matthews on behalf of the Cincinnati & Columbus Traction Company, and Mr. R. Walton Moore on behalf of the petitioners. Mr. Denison was granted until to morrow to file a brief. Thereupon said cause was taken under advisement by the Court.

39 *Journal entry.*

Proceedings of February 10, 1912.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY ET AL., PETITIONERS,
vs.
THE UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS,
INTERSTATE COMMERCE COMMISSION, INTERVENER. } No. 60.

In said cause the Court directed that an order be entered granting a preliminary injunction and denying the motion to dismiss. The Court stated that inasmuch as the grounds upon which this injunction is granted go to the merits of the case and virtually dispose of it, as now appears, an opinion will be filed as soon as it can be prepared in which the views of the Court will be more fully expressed.

40 *Order denying motion to dismiss and granting preliminary injunction.*

Entered February 14, 1912.

In the United States Commerce Court.

February Term, 1912.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
vs.
THE UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS,
THE INTERSTATE COMMERCE COMMISSION, INTERVENER. } In Equity No. 60.

ORDER.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

That the motion of the United States to dismiss the petition be denied;

That a preliminary injunction issue as prayed in the petition, and that the order of the Interstate Commerce Commission, made on the 13th day of December, 1911, on complaint of the Cincinnati &

Columbus Traction Company *vs.* the Baltimore & Ohio Southwestern Railroad Company et al. the said order being as set forth in the petition herein, be suspended and enjoined until the further order of the Court.

By the Court:

MARTIN A. KNAPP,
Presiding Judge.

FEBRUARY 14, 1912.

41 *Order granting Cincinnati & Columbus Traction Company leave to withdraw answer, etc.*

Entered February 16, 1912.

In the United States Commerce Court.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY
vs.
THE UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY. } No. 60.

Upon application of The Cincinnati and Columbus Traction Company, one of the respondents herein, leave is hereby given to it to withdraw its answer, and to elect to stand upon the motion to dismiss the petition, and said answer is accordingly withdrawn and said election hereby entered of record.

MARTIN A. KNAPP,
Presiding Judge.

FEBRUARY 16, 1912.

42 *Motion of Interstate Commerce Commission for leave to withdraw answer, etc.*

Filed February 17, 1912.

In the United States Commerce Court.

February session, 1912.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
v.
UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS, AND INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT. } No. 60.

Comes now the Interstate Commerce Commission, intervening respondent, and asks leave to withdraw its answer heretofore filed

herein and to join in and adopt the motion of the United States to dismiss the petition in said cause.

CHAS. W. NEEDHAM,
Solicitor for the Interstate Commerce Commission.

43 *Order granting Interstate Commerce Commission leave to withdraw answer, etc.*

Entered February 17, 1912.

In the United States Commerce Court.

February session, 1912.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
v.
UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS, AND INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT. } No. 60.

On motion duly made and filed in that behalf, it is ordered that leave be and the same is hereby given the Interstate Commerce Commission, intervening respondent in the above entitled cause, to withdraw its answer heretofore filed herein and to join in and adopt the motion of the United States to dismiss the petition.

By the court:

MARTIN A. KNAPP,
Presiding Judge.

44 *Election of United States and Interstate Commerce Commission to stand upon motion to dismiss.*

Filed February 17, 1912.

In the United States Commerce Court.

February session, 1912.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
v.
UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS, AND INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT. } No. 60.

Come now the United States of America, respondent, and the Interstate Commerce Commission, intervening respondent, by their re-

spective counsel, and inform the court that they elect to stand upon the motion to dismiss.

WINFRED T. DENISON,
Assistant Attorney General.
CHAS. W. NEEDHAM,
Solicitor for the Interstate Commerce Commission.

45 *Opinion.*

Filed April 9, 1912.

United States Commerce Court.

No. 60.—February session, 1912.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
v.
UNITED STATES OF AMERICA AND CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS.
INTERSTATE COMMERCE COMMISSION, INTERVENER.

ON MOTION FOR PRELIMINARY INJUNCTION.

For opinion of the Interstate Commerce Commission, see 20 I. C. C. Rep., 486.

Mr. Edward Barton, *Mr. Theodore W. Reath*, and *Mr. R. Walton Moore*, with whom *Mr. Joseph I. Doran* was on the brief, for the petitioners.

Mr. Winfred T. Denison, Assistant Attorney General, and *Mr. Blackburn Esterline*, special assistant to the Attorney General, for the United States.

Mr. C. Bentley Matthews for the Cincinnati & Columbus Traction Company.

Mr. Charles W. Needham for the Interstate Commerce Commission.

46 Before KNAPP, Presiding Judge, and ARCHBALD HUNT, CARLAND, and MACK, Judges.

[April 9, 1912.]

ARCHBALD, *Judge:*

This is a bill to set aside an order of the Interstate Commerce Commission. The proceedings before the Commission were instituted by the Cincinnati & Columbus Traction Company, an electric suburban railway, incorporated under the laws of Ohio, against the Baltimore & Ohio Southwestern Railroad and the Norfolk & Western

Railway, two separate trunk lines running east and west across the State of Ohio. The proceedings were taken under the first section of the interstate-commerce act to compel a switch connection at separate points with each of the railroads mentioned, and also to secure through routes and joint rates under the fifteenth section. There was a prayer in the latter connection that the railroads be required to exchange cars and equipment. The Commission in a joint order against both roads substantially granted the relief prayed for.

The provisions of the act with regard to the compelling of switch connections are as follows:

"Any common carrier subject to the provisions of this act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track
47 which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper *or owner of such lateral, branch line of railroad*, such shipper *or owner of such lateral, branch line of railroad* may make complaint to the Commission, as provided in section thirteen of this act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than the orders for the payment of money."

The words in italics were not in the act at the time the application for the switches in question was made to the railroads, nor at the time of the complaint to the Commission, which followed, but were introduced over a year afterwards, in June, 1910, by way of amendment. At the time the proceedings were instituted, therefore, the traction company had no right to file the complaint, and the
48 Commission, in consequence, except for the change in the law, would have been without authority to entertain it. *Interstate Commerce Commission* v. *D. L. & W. R. R.*, 216 U. S., 531. After the testimony had been taken, however, and before any order had been entered, in March, 1910, immediately following the decision just cited, the case was reopened at the instance of the traction company to permit two shippers along the line of the road, one at Marathon and the other at Hillsboro, to be added as complainants. This was

objected to by the railroads on the ground that it could not overcome the want of jurisdiction when the case originated, and could not in any respect supply the necessary preliminary application in writing, which is required by the statute as the basis of the subsequent proceedings. The Commission overruled the objection, and, having considered the case on the merits, made the following order:

"This case coming on to be further considered, and it appearing that the parties in interest have failed to put in effect the findings made by this Commission in its report herein, dated March 14, 1911, and that the above-named complainant petitions by counsel for an order of relief in the premises:

"It is ordered that defendant The Baltimore & Ohio Southwestern Railroad Company be, and it is hereby, notified and required to construct, on or before the 15th day of February, 1912, and thereafter to maintain and operate during a period of not less than two years, a switch connection for the transfer of interstate traffic to and
49 from the line of the above-named complainant company at Madeira, Ohio, the expense of installing such connection to be borne by said complainant.

"It is further ordered that said defendant The Baltimore & Ohio Southwestern Railroad Company, be, and it is hereby, notified and required to construct, on or before the 15th day of February, 1912, and thereafter to maintain and operate during a period of not less than two years, a switch connection for the transfer of interstate traffic to and from the line of the above-named complainant company at or near Hillsboro, Ohio, the expense of installing such connection to be borne by said complainant.

"It is further ordered that defendant Norfolk & Western Railway Company be, and it is hereby, notified and required to construct, on or before the 15th day of February, 1912, and thereafter to maintain and operate during a period of not less than two years, a switch connection for the transfer of interstate traffic to and from the lines of the above-named complainant company at or near Hillsboro, Ohio, the expense of installing such connection to be borne by said complainant.

"And it is further ordered that defendants The Baltimore & Ohio Southwestern Railroad Company and Norfolk & Western Railway Company, according as their various lines may run, be, and they are hereby, notified and required to establish and put in force, on or before the 15th day of February, 1912, and for a period of at least two years thereafter to maintain, through routes to and from
50 interstate points to and from all points on the complainant's line between and including Boston and Dodsonville, in the State of Ohio, in order that shippers at and between those points may have access to and from interstate points by interchange of cars under through billing and through charges based upon the rates of the respective carriers herein to and from the junction points established by this order, the complainant carrier having filed its local

rates with this Commission as applicable to interstate movements over such through routes."

Several objections are made to this order. In the first place, renewing the one made before the Commission, it is contended that the introduction, while the case was pending before the Commission, of entirely new and different complainants, who had made no previous application for the switches, was beyond the power of the Commission to allow, and vitiates the proceedings. An initial application in writing from the party entitled to make it at the time is essential, as it is said, in order to comply with the statute, and can not be dispensed with nor afterwards supplied, and, with all that has been done, is still lacking. Nor is this met, as it is urged, by the suggestion that the Commission is an administrative body not hampered by rules, and thus competent to reform the proceedings in the way which was done to meet the exigency.

It was also further objected that the Commission failed to determine the compensation to be severally made to the railroads for the switch connection with each which was ordered, having simply
51 directed that the expense of installation should be borne by the traction company, without more, although the statute requires that, along with the question of the safety, practicability, and justification for the switch connection, the Commission shall determine the reasonable compensation for it.

And it is finally objected that, in excess of its powers or even of Congress itself to require (*Central Stock Yards Co.* v. *Louisville & Nashville R. R.*, 192 U. S., 568; *Same* v. *Same*, 212 U. S., 132), the Commission ordered an interchange of cars along with through billing.

These are serious objections which would have to be carefully considered except for the conclusion which we have reached on the underlying question, viz, whether the traction company's road is a "lateral, branch line of railroad" within the meaning of the statute, which, if found against that company, is conclusive.

The Cincinnati & Columbus Traction Company was organized and is operated under the laws of Ohio as an electric interurban railway and is classified by those laws with street railways, by the provisions for which, and not those for steam railroads, it is controlled and regulated. It was chartered to construct a line of this character from Cincinnati to Columbus, something over a hundred miles, which has actually been built from Norwood, a suburb of Cincinnati, to Hillsboro, about half the distance. It is a common carrier of persons and property, and is also engaged in the transportation of express matter.

52 The Baltimore & Ohio Southwestern Railroad is a consolidated corporation organized under the laws of Ohio and Indiana, and operating an eastern and western trunk line, through and across those States, into and through the State of Illinois, and also into the State of Kentucky. It reaches Hillsboro by a branch line which connects with its main line, running to Cincinnati.

The Norfolk & Western Railway is organized under the laws of Virginia and operates a line of railway extending through parts of Ohio, West Virginia, Kentucky, Maryland, North Carolina, and Tennessee. It also has a branch line to Hillsboro, which connects with its main line to Cincinnati.

In relative position to the line of the Cincinnati & Columbus Traction Company the Baltimore & Ohio Southwestern is to the north and the Norfolk & Western to the south of it, the traction company's railroad being intermediate between the two and substantially dividing the diamond-like section of territory lying in between them. At Norwood the station of the traction company immediately adjoins that of the Baltimore & Ohio Southwestern, and for about six miles east from there its line not only parallels but is contiguous to the right of way of that railroad, while a few miles further on, at Perinton, it practically adjoins the right of way of the Norfolk & Western, which it similarly parallels for about four miles to Stonelick; and at the other or eastern end, for a distance of some four or five miles, at Hillsboro, it again parallels the tracks of the Baltimore &
53 Ohio Southwestern, the rights of way of the two roads being immediately adjacent.

As found by the Commission in its report, the communities common to the traction company and the railroads at the eastern end of the line in the vicinity of Hillsboro are reasonably well served by those roads with respect to interstate shipments; and the same is true also of the places at the other end, from Stonelick westward, some of which are within a stone's throw of either the Norfolk & Western or the Baltimore & Ohio Southwestern. But at Boston, to the east of there, a town of some five hundred inhabitants, the distance is about five miles by the country roads to Batavia and something less than that to Baldwin, both of them stations on the line of the Norfolk & Western, and not less than eight miles to the nearest station on the Baltimore & Ohio Southwestern, while Dodsonville, a town of one hundred and fifty people, still further east towards Hillsboro, is also some four or five miles away from any station on the Baltimore & Ohio Southwestern and as much as eight miles from the nearest station on the Norfolk & Western. And between Boston on the west and Dodsonville on the east, a distance of about twenty miles, there are several villages, the largest of which is Fayetteville, with seven hundred inhabitants, which are from five to twelve miles distant from one or the other of the steam roads in question.

Conceiving that the first set of places described were sufficiently served in interstate commerce by the Norfolk & Western Rail-
54 way or the Baltimore & Ohio Southwestern Railroad, the Commission declined, so far as they were concerned, to make any order establishing through routes or joint rates between the steam roads and the traction company. But, on the other hand, this not being the case between Boston and Dodsonville, by reason of the distance from the steam roads, approximating not less than five miles

in each instance, through routes and joint rates were established, and a switch connection given to make this effective. This connection was directed to be made, as to the Baltimore & Ohio Southwestern Railroad, at or near Hillsboro on the eastern end, and at Madeira, a few miles out of Norwood, on the western; and as to the Norfolk & Western at Hillsboro only, nothing being said as to any connection with it to the westward. The exact points where the connections should be made were not indicated, but the feasibility of connecting in each instance is asserted, in view of the fact that when the traction road was in process of construction, ten or more years ago, there was such a physical connection with the one road at Madeira on the western end and with both roads on the eastern end at a point spoken of as Hillsboro Junction. It is intimated that if the parties can not agree as to the specific place for making the connection in each case, a more definite order will be entered.

In considering whether upon this showing the Cincinnati & Columbus Traction Company is a lateral branch railroad, within the meaning of the law, it is to be observed that, according to the test ap-
55 plied by the Commission, it is held to be such as to places and shippers along its line in the intermediate territory between Dodsonville and Boston, remote from and not sufficiently served by the trunk lines, but not as to those east or west of there, as the road approaches its termini, where this is not the case. But it is obvious that this is not and can not be the correct criterion. A road is or is not a lateral branch railroad, according to the relation which it bears to the line with which a switch connection is asked. And this relation is one of road to road, and not of shippers or territory. A road, in other words, does not have the character of a branch or lateral road as to some shippers and territory and not have it as to others. There is no such dividing up or limiting it, nor can it be of that shifting kind. Looking to the purpose of the law, a road is a lateral branch road when it is tributary to and dependent on another for an outlet; that is to say, where it is essentially a feeder, contributing traffic and capable of interchanging it therewith. It is not such where it is in effect an independent and competing line. Nor is this any less the case because it may not compete as to a portion of the territory involved. It is the general effect which decides, and that is not in doubt here. All three roads in the present instance have the same general east and west direction, and, so far as concerns Hillsboro on the east and Cincinnati or Norwood on the west, run between the same points. For half this distance also one or other of the steam roads draws its local traffic from and serves substantially
56 the same territory as the traction company. And so clearly are they, within the limits named, competing lines, that admittedly any attempt to consolidate the traction company with either of them would offend against the State if not the Federal law. Neither is it every carrier that is entitled to a switch connection with every other. As is said in the *Rahway Valley Railroad case* (216

U. S., 531), "The object was not to give a roving commission to every road that might see fit to make a descent upon a main line." It is the dependent or tributary character which gives rise to the right, and that is not determined by mere proximity or terminal approach, or the fact that the road seeking a connection has come to the end of its line. The contrast in the statute is with a private side track constructed to connect with an interstate carrier, with which a lateral branch road is thus associated and presumably intended to be compared. The point here is that the traction company's road, instead of being dependent or tributary, is in its own peculiar sphere, and, as to both the steam roads, an equal, independent, and competing line. Nor is this affected by the fact that as at present constructed it extends no further than Hillsboro or Norwood, and that upon the arrival at either of these places its carriage of persons or property is at an end. This is true even of a trunk line, when its terminus is reached, without thereby making out the necessary relation by which a switch connection with another road is able to be compelled. It may be that some shippers along the line of the traction com-
57 pany's road are not so fully accommodated as they might be, as the case stands; and their needs are to be consulted to a certain extent without doubt. But this is not controlling, and their rights have necessarily to be worked out through the road for which in each instance a switch connection is sought, the character of which as a lateral branch line is only incidentally affected thereby. Without undertaking therefore to further define a "lateral branch line of railroad," we are clearly of opinion that the road of this traction company does not come within any reasonable meaning of the language used in the statute to describe the class of roads entitled to a switch connection. And if we are right in this view, the Commission was without jurisdiction to make the order in question.

A preliminary injunction was therefore properly ordered and the motion to dismiss will be overruled.

58 *Journal entry.*

Proceedings of April 19, 1912.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY ET AL., PETITIONERS, *vs.* THE UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS; INTERSTATE COMMERCE COMMISSION, INTERVENER.	No. 60.

This 19th day of April, 1912, this cause came on for further hearing, and thereupon the counsel for the petitioners, before moving for a final decree, offered in evidence a duly certified copy of the pleadings and evidence had and taken before the Interstate Commerce

Commission in the proceedings which resulted in the order attacked in this cause, and moved the Court to receive the same as evidence and make the same a part of the record herein, the same having been heretofore filed in the office of the clerk on February 7, 1912.

And thereupon the counsel for the respondents and each of them objected to receiving the same in evidence and making the same a part of the record in said cause for the following reasons, viz:

1. That in the state of the pleadings herein and upon the issue determined by this Court as set forth in its opinion, the said evidence is irrelevant and immaterial.

2. That the said evidence before the Interstate Commerce Commission is relevant and material only upon allegations as to whether the Commission had before it substantial evidence upon which to base the order, and that said issue was not considered or determined by the Court in its opinion.

59 3. That the Court in the hearing of said cause and in writing its opinion herein did not consider the said evidence or any part of the same.

And thereupon the Court overruled the said offer and declined to receive the said evidence before the said Interstate Commerce Commission, on the ground that it was irrelevant and immaterial upon the issue determined by the Court.

To which ruling of the Court an exception was duly prayed by the petitioners and each of them and allowed and made a part of the record.

Whereupon counsel for the petitioners moved for a final decree.

60 *Final decree.*

Entered April 19, 1912.

In the United States Commerce Court.

April Session, 1912.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS, v. UNITED STATES OF AMERICA AND CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS, INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT.	No. 60.

FINAL DECREE.

It appearing that the answers heretofore filed by the respondent, Cincinnati & Columbus Traction Company, and the intervening

respondent, the Interstate Commerce Commission, have been withdrawn, and that said parties have united in the motion to dismiss, filed herein by the United States, and that both of said respondents and said intervening respondent elect to stand on the said motion to dismiss and decline to make answer or otherwise further plead.

It is now by the Court adjudged, ordered and decreed, for the reasons stated in the opinion of this Court, which is hereby made a part of the record, that the said motion to dismiss be and the same is hereby overruled; that the preliminary injunction heretofore awarded herein be, and the same is, now made permanent and perpetual; that the said order of the Interstate Commerce Commission attacked in this case be, and the same is, now wholly set aside and annulled.

BY THE COURT:

MARTIN A. KNAPP,
Presiding Judge.

To the entry of which decree the said respondents and the said intervening respondent severally object and except.

61 *Petition for appeal.*

Filed April 23, 1912.

In the United States Commerce Court.

April Session, 1912.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
v.
UNITED STATES OF AMERICA AND CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS, INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT. } No. 60.

PETITION FOR APPEAL.

The United States of America and Cincinnati & Columbus Traction Company, a corporation, respondents, and Interstate Commerce Commission, intervening respondent, feeling themselves aggrieved by the final order or decree of the Commerce Court, entered April 19, 1912, by their respective counsel, pray an appeal to the Supreme Court of the United States from the said final order or decree.

The particulars wherein the United States and the other respondents consider the final order or decree erroneous are set forth in the assignment of errors on file, to which reference is made.

And the said United States and the other respondents pray that a transcript of the record, proceedings and papers on which the said

order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

GEORGE W. WICKERSHAM,
Attorney General of the United States.
C. BENTLEY MATTHEWS,
Solicitor for Cincinnati & Columbus Traction Company.
CHAS. W. NEEDHAM,
Solicitor for Interstate Commerce Commission.

Allowed:
MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court in said cause.

62 *Assignment of errors.*

Filed April 23, 1912.

In the United States Commerce Court.

April Session, 1912.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
v.
UNITED STATES OF AMERICA AND CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS, INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT. } No. 60.

ASSIGNMENT OF ERRORS.

Come now the United States of America and Cincinnati & Columbus Traction Company, a corporation, and Interstate Commerce Commission, by their respective counsel, and in connection with their petition for appeal, file the following assignment of errors on which they will rely upon said appeal to the Supreme Court of the United States from the final order or decree of the Commerce Court entered against them April 19, 1912, in the above entitled cause:

I.

The Commerce Court erred in granting the preliminary injunction enjoining the order of the Interstate Commerce Commission of December 13, 1911, which is fully set out in the petition, and in suspending the force and effect of the same.

II.

The Commerce Court erred in denying the motion of the United States to dismiss the petition, which said motion was joined in and adopted by the respondents Cincinnati & Columbus Traction Company and Interstate Commerce Commission, and in not sustaining the said motion.

63 III.

The Commerce Court erred in holding and adjudging that the line of railroad of respondent Cincinnati & Columbus Traction Company is not a lateral branch line of railroad within the meaning of the act of Congress entitled "An Act to Regulate Commerce", etc., approved February 4, 1887, as amended by an act entitled "An Act to Create a Commerce Court", approved June 18, 1910.

IV.

The Commerce Court erred in holding and adjudging that the Interstate Commerce Commission was and is without power to order and require the Baltimore & Ohio Southwestern Railroad Company to maintain and operate during a period of not less two years from February 15, 1912, a switch connection with the Cincinnati & Columbus Traction Company for the transfer of interstate traffic to and from the line of the said traction company, at or near Hillsboro, Ohio, the expense of installing such connection to be borne by the said traction company.

V.

The Commerce Court erred in holding and adjudging that the Interstate Commerce Commission was and is without power to order and require the Norfolk & Western Railway Company to maintain and operate during a period of not less than two years from February 15, 1912, a switch connection with the Cincinnati & Columbus Traction Company for the transfer of interstate traffic to and from the line
of the said traction company, at or near Hillsboro, Ohio, the
64 expense of installing such connection to be borne by the said traction company.

VI.

The Commerce Court erred in holding and adjudging that the Interstate Commerce Commission was without power to order and require the Baltimore & Ohio Southwestern Railroad Company and Norfolk & Western Railway Company, according as their various lines may run, to establish and put in force, and to maintain for a period of at least two years from February 15, 1912, through routes to and from interstate points to and from all points on the line of the Cin-

cinnati & Columbus Traction Company between and including Boston and Dodsonville, in the State of Ohio, in order that shippers at and between those points may have access to and from interstate points by interchange of traffic under through billing and through charges based upon the rates of the respective railroad companies to and from the junction points established by the order of the Interstate Commerce Commission.

VII.

The Commerce Court erred in holding and adjudging that the Interstate Commerce Commission was without power or authority to determine whether the line of railroad of said Cincinnati & Columbus Traction Company is a lateral branch line of railroad and was without power to establish through interstate routes from and to such points upon the said traction company's line as were not, and are not adequately served by the other two companies named.

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VIII.

The Commerce Court erred in setting aside and annulling the said order of the Interstate Commerce Commission, and in making permanent the preliminary injunction issued February 14, 1912, and in overruling the motion to dismiss the petition, for that (a) the petition does not set forth any cause of action and is insufficient to warrant the granting of the injunction or to form the basis for any relief from the order of the Interstate Commerce Commission; (b) nor have the said petitioners shown that there is any equity in their said petition upon which to grant any injunction or to form the basis for any relief from the said order; (c) nor have the petitioners shown that in making the said order the Interstate Commerce Commission acted beyond or without its jurisdiction or exceeded any power or authority conferred upon it by the Act to Regulate Commerce; (d) nor have the said petitioners shown that in making its said order the Interstate Commerce Commission violated any right of the said petitioners protected by the Constitution of the United States or any other right of the said petitioners over which this Court may exercise jurisdiction.

Wherefore, The United States and the other respondents pray that the said final order or decree of the Commerce Court, entered April 19, 1912, be reversed, annulled and set aside with directions that the petition be dismissed and for such other and further order as may be appropriate.

GEORGE W. WICKERSHAM,
Attorney General of the United States.
C. BENTLEY MATTHEWS,
Solicitor for Cincinnati & Columbus Traction Company.
CHAS. W. NEEDHAM,
Solicitor for Interstate Commerce Commission.

66 *Order allowing appeal.*

Entered April 23, 1912.

In the United States Commerce Court.

April Session, 1912.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
v.
UNITED STATES OF AMERICA AND CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS. INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT. } No. 60.

ORDER ALLOWING APPEAL.

In the above-entitled cause, the United States of America, and Cincinnati & Columbus Traction Company, respondents and Interstate Commerce Commission, Intervening Respondent, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the Commerce Court entered April 19, 1912, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided—

It is ordered and decreed, That the said appeal be, and the same is hereby allowed as prayed and made returnable on the 23d day of May, A. D. 1912; and the Clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings and papers on which said order or decree was made and entered to the Supreme Court of the United States.

MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court in said cause.

67 In the United States Commerce Court.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
v.
UNITED STATES. } No. 60.

PRAECIPE FOR RECORD.

TO THE CLERK:

You will please prepare a transcript of the record in the above entitled cause to be filed in the Office of the Clerk of the Supreme

Court of the United States, upon the appeal in the above entitled cause, and include in the said transcript the following pleadings, proceedings, and papers on file or of record, to wit:

Petition for Injunction with exhibits;
Notice issued and filed in the Department of Justice;
Notice issued and filed with the Interstate Commerce Commission;
Notice issued to The Cincinnati & Columbus Traction Company;
Appearance of Interstate Commerce Commission;
Appearance of The Cincinnati & Columbus Traction Company;
Notice of Motion for Injunction;
Motion of the United States to Dismiss the Petition;
Journal Entry of Hearing, February 7, 1912;
Journal Entry of Action of the Court, February 10, 1912;
Order granting Preliminary Injunction, February 14, 1912;
Order Granting Leave to The Cincinnati & Columbus Traction Company to Withdraw Answer and to Elect to Stand upon the Motion to Dismiss;

68 Motion of Interstate Commerce Commission to Withdraw its Answer and to join in and adopt Motion to Dismiss;

Order entered Granting Leave to Interstate Commerce Commission to Withdraw its Answer and to Join in and Adopt the Motion to Dismiss;
Election of the United States and Interstate Commerce Commission to stand upon the Motion to Dismiss;
Opinion of the Commerce Court, April 9, 1912;
Journal Entry of Proceedings, April 19, 1912;
Final Decree;
Petition for Appeal;
Assignment of errors;
Order allowing Appeal.

BLACKBURN ESTERLINE
Special Assistant to the Attorney General.
C. BENTLEY MATTHEWS
Solicitor for The Cincinnati & Columbus Traction Company.
CHAS. W. NEEDHAM
Solicitor for Interstate Commerce Commission.

69 *Notice of filing of praecipe and acknowledgment of service thereof.*

Filed May 4, 1912.

In the United States Commerce Court.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
v.
UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS, AND INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT. } No. 60.

NOTICE.

To

EDWARD BARTON, Esq.,
Solicitor for The Baltimore & Ohio Southwestern Railroad Company, and
R. WALTON MOORE, Esq., and
THEODORE W. REATH, Esq.,
Solicitors for The Norfolk & Western Railway Company.

Please take notice that the Respondents and the Intervening Respondent have filed in the Office of the Clerk of the United States Commerce Court praecipe for record, of which the attached is a certified copy.

BLACKBURN ESTERLINE
Special Assistant to the Attorney General.

Service of a copy of the above notice, with a certified copy of praecipe for record is hereby admitted this 1st day of May, 1912.

EDWARD BARTON
Solicitor for the Baltimore & Ohio Southwestern Railroad Company.
JOSEPH I. DORAN, THEODORE W. REATH and R. WALTON MOORE
Solicitors for The Norfolk & Western Railway Company.

70 United States Commerce Court.

No. 60.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS, INTERSTATE COMMERCE COMMISSION, INTERVENER.

UNITED STATES OF AMERICA, *ss:*

I, G. F. Snyder, Clerk of the United States Commerce Court, do hereby certify the above and foregoing (on pages numbered 1 to 69, inclusive) to be a true and complete transcript of the proceedings had and papers filed in the above entitled cause, made in accordance with the praecipe filed in the office of the Clerk of said Court on the first day of May, 1912, as the same appear from the original record in the Clerk's Office of said Court.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States Commerce Court this 4th day of May, A. D., 1912.

[SEAL.] G. F. SNYDER, *Clerk.*

71 *Citation on appeal.*

UNITED STATES OF AMERICA, *ss:*

To BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, AND THE NORFOLK & WESTERN RAILWAY COMPANY.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal duly allowed and filed in the Clerk's Office of the United States Commerce Court, wherein the United States of America, Cincinnati & Columbus Traction Company, a corporation, and Interstate Commerce Commission, are appellants and you are appellees, to show cause, if any there be, why the final order or decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Martin A. Knapp, Presiding Judge of the United States Commerce Court, this 23d day of April, A. D. 1912.

MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court.

Service of a copy of the within citation is hereby admitted this 29th day of April, A. D., 1912.

EDWARD BARTON,
Solicitor for Baltimore & Ohio Southwestern Railroad Company.

Service of a copy of the within citation is hereby admitted this 24th day of April, A. D., 1912.

THEODORE W. REATH,
R. WALTON MOORE,
Solicitors for The Norfolk & Western Railway Company.

(Indorsed:) File No. 23209. U. S. Commerce Court. Term No. 1133. The United States of America, Cincinnati & Columbus Traction Company, and Interstate Commerce Commission, appellants, vs. Baltimore & Ohio Southwestern Railroad Company and The Norfolk & Western Railway Company. Filed May 11th, 1912. File No. 23209.

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In the Supreme Court of the United States.

OCTOBER TERM, 1911.

UNITED STATES OF AMERICA, THE CINCINNATI & COLUMBUS TRACTION COMPANY, and Interstate Commerce Commission, intervenor, appellants,
v.
THE BALTIMORE & OHIO SOUTHWESTERN Railroad Company and the Norfolk & Western Railway Company.
} No. —.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

MOTION TO ADVANCE.

Comes now the Solicitor General on behalf of the United States and moves the court to advance the above-entitled cause for hearing.

The appeal is from a final order or decree of the Commerce Court entered April 19, 1912, annulling and enjoining an order of the Interstate Commerce Commission of December 13, 1911.

The following questions, among others, are involved:

1. Whether the line of railroad extending from Hillsboro, Ohio, on the east, to Norwood, Ohio, on

the west, and owned and operated by the Cincinnati & Columbus Traction Company, a corporation organized and operated under the laws of the State of Ohio as an electric interurban railway and a common carrier of freight and passengers for hire, is a lateral branch line of railroad within the meaning of the act to regulate commerce.

2. Whether the Interstate Commerce Commission has the power to order and require the Baltimore & Ohio Southwestern Railroad Company to maintain and operate during a period of not less than two years a switch connection with the said Cincinnati & Columbus Traction Company for the transportation of interstate traffic to and from the line of said traction company, at or near Hillsboro, Ohio, the expense of installing such connection to be borne by the said traction company.

3. Whether the Interstate Commerce Commission has the power to order and require the Norfolk & Western Railway Company to maintain and operate during a period of not less than two years a switch connection with the Cincinnati & Columbus Traction Company for the transporting of interstate traffic to and from the line of the said traction company at or near Hillsboro, Ohio, the expense of installing such connection to be borne by the said traction company.

4. Whether the Interstate Commerce Commission has the power to order and require the Baltimore & Ohio Southwestern Railroad Company and the Norfolk & Western Railway Company, according as their

various lines may run, to establish and put in force, and to maintain for a period of at least two years, through routes to and from interstate points to and from all points on the line of the Cincinnati & Columbus Traction Company between and including Boston and Dodsonville, in the State of Ohio, in order that shippers at and between those points may have access to and from interstate points by interchange of traffic under through billing and through charges based upon the rates of the respective railroad companies to and from the junction points established by the order of the Interstate Commerce Commission.

Public interests are involved, and the priority suggested is authorized by section 2 of the act of June 18, 1910 (36 Stat. 539, 542).

Counsel for appellees concur.

F. W. LEHMANN,
Solicitor General.

MAY, 1912.

○

No. 648.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES OF AMERICA, CINCINNATI & COLUMBUS TRACTION COMPANY, AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY.

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

CHARLES W. NEEDHAM,
Assistant Solicitor for Interstate Commerce Commission.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1912

INDEX.

CASES CITED.

STATUTES.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES OF AMERICA, CINCINNATI & COLUMBUS TRACTION COMPANY, and INTERSTATE COMMERCE COMMISSION, Appellants,

v.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY and the NORFOLK & WESTERN RAILWAY COMPANY.

No. 648.

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

This case involves a decision of the Interstate Commerce Commission holding that the Cincinnati & Columbus Traction Company, one of the appellants herein, is, as to the appellees herein, a "lateral" railroad, within the provision of section 1 of the act to regulate commerce.

STATEMENT OF THE CASE.

This is an appeal from the final decree of the United States Commerce Court in a suit brought by the appellees, petitioners in said Commerce Court, to

prevent the enforcement of two orders made by this appellant, hereinafter called the Commission, requiring the appellees (1) to establish, and maintain for two years, switch connections with the Cincinnati & Columbus Traction Company for the transfer of interstate traffic, and (2) to establish, and for two years maintain, through routes to and from interstate points to and from all stations between and including Boston and Dodsonville, on the line of the Traction Company. The orders were entered on the 13th day of December, 1911, in one decree, and are set forth in full on page 4 of the printed transcript of record herein. The report of the Commission, upon which the order was entered, is to be found upon pages 8 to 16, inclusive, of the transcript of record herein. The first order—requiring switch connections—was made under the provisions of section 1 of the act to regulate commerce, as amended June 18, 1910. The second order—requiring through routes to certain stations—was made under the provisions of section 15 of said act, as amended.

The proceedings before the Commission were instituted upon a complaint by the Cincinnati & Columbus Traction Company, a corporation, organized under the laws of the State of Ohio as an electric railway for the transportation of passengers and freight, as a common carrier, between Columbus and Cincinnati in said state. Its railroad as now constructed and operated extends from Norwood, a suburb of Cincinnati, to Hillsboro, Ohio, a distance of about 53 miles; its line is wholly within the State of Ohio and belongs

to the class commonly referred to as "interurban" electric roads; its complaint before the Commission was filed on January 21, 1909. The complaint, and the evidence taken by the Commission, showed that prior to the filing of the complaint on November 12, 1908, the Traction Company served a written notice on each of the appellees herein demanding that they establish, or permit to be established, switch connections and through routes and joint rates for the interchange of interstate traffic. (Record, pp. 10, 11.) This request being refused, the complaint was filed before the Commission as stated, and the appellees, upon due notice, appeared and contested the right of the Traction Company to have the relief prayed for.

During the pendency of the proceeding before the Commission this honorable court rendered its opinion in *Interstate Commerce Commission* v. *D., L. & W. R. R. Co.* (216 U. S., 531), holding that the Commission could only grant switch connections with lateral roads, under the act as then existing, upon the complaint of shippers. While the proceedings before the Commission were pending and undetermined, certain shippers on the line of the Traction Company addressed letters to the Commission, and gave evidence upon the hearing which, it was held by the Commission, had the effect of joining them in the complaint. (Record, pp. 10, 11.)

Subsequent to the decision by this honorable court cited above, and prior to the determination of the case by the Commission, Congress, by act approved June 18, 1910, amended section 1 of the act, and

provided that the Commission should have power to order a switch connection "upon application of *any lateral, branch line of railroad or* of any shipper tendering interstate traffic for transportation," etc.

After the amendment of the act, the case before the Commission was reopened, and set down for rehearing and argument. (Record, p. 3.)

The case was finally determined by the Commission upon the complaint of the Traction Company, joined in by certain shippers, and under the act as amended. (Report of the Commission, record, pp. 10, 11.) Subsequent to the report the Traction Company filed with the Commission its schedule of local rates to be applied to interstate traffic. (Com.'s Rept., record, p. 16, and petition, record, p. 2.)

The appellee, the Baltimore & Ohio Southwestern Railroad Company, is a consolidated corporation, organized under the laws of Ohio and Indiana, and operating a line of railway extending across said states, the State of Illinois and into the State of Kentucky (petition, record, p. 1). Its line passes through Hillsboro, Norwood and Cincinnati, in the State of Ohio, and it is a carrier of interstate commerce. Between the city of Cincinnati and Hillsboro the line of this appellee makes a detour to the north into Warren and Clinton Counties, returning southerly to Hillsboro in Highland County. (See map, record, p. 8.) The appellee, the Norfolk & Western Railway Company, is a corporation organized under the laws of Virginia, operating an interstate railroad through parts of Ohio, West Virginia,

Kentucky, Virginia, Maryland, North Carolina and Tennessee. It also passes through Cincinnati and Hillsboro, making a detour to the south in the counties of Claremont and Brown, to Sardinia, thence northerly to Hillsboro. (Map, record, p. 8.) This left a large territory, about 15 miles across at its widest section, without railroad facilities. In this territory were villages whose inhabitants could only reach the railroads of appellees by a wagon haul varying from 5 to 10 miles over country roads. The Traction Company line pursues generally a middle and more direct course from Norwood to Hillsboro, and supplies this territory with railroad facilities. (Map, p. 8.) In addition to its local business the Traction Company transports interstate freight and passengers from this territory, but without the benefits of switch connections or through routes and through rates, transferring its traffic either at Norwood or Hillsboro by independent transfers, at the expense of the shippers, to the railroads of the appellees. To facilitate this interstate traffic the Traction Company and shippers asked to have (1) switch connections at Norwood and at Hillsboro upon which to make transfers without expense to shippers; and (2) through routes and joint rates to facilitate the interstate business.

After a full hearing at which the appellees and each of them appeared and submitted evidence, briefs and arguments, and after a physical examination of the several roads and their connections by the Commission, the Commission filed its report in writing, stating

its findings and conclusions, upon each branch of the case, as required by the act, and entered the orders in controversy. The orders required the appellees to establish the switch connections, and the through routes, on or before the 15th day of February, 1912, and to maintain them for two years thereafter. The appellees filed their petition in the United States Commerce Court on January 22, 1912, and a preliminary injunction staying both orders of the Commission was issued.

The United States filed a motion to dismiss the petition. (Record, pp. 20, 21.) The Commission intervened and filed an answer to the petition. As the Commerce Court in its opinion determined the case upon the sole ground that the traction line was not a lateral railroad the answer of the Commission was afterwards, on February 17, 1912, withdrawn by leave of the court, and the Commission joined in, and adopted the motion of the United States to dismiss the petition. The Traction Company also appeared as an intervening respondent, and joined in the motion of the United States to dismiss the petition.

The respondents elected to stand by the motion to dismiss. The Commerce Court rendered its opinion on April 9, 1912 (record, pp. 25 to 31), and on the 19th day of April entered a final decree overruling the motion to dismiss for the reasons stated in the opinion of the court, and perpetually enjoined the enforcement of both the orders in question, treating them as one order. From this decree an appeal was taken to this court.

ERRORS ASSIGNED.

Several questions were raised in the Commerce Court which that court did not determine for the reasons stated in the opinion as follows:

> These are serious objections which would have to be carefully considered except for the conclusion which we have reached on the underlying question, viz, whether the Traction Company's road is a "lateral, branch line of railroad" within the meaning of the statute, which, if found against that company, is conclusive. (Record, p. 28.)

And, treating the two orders as dependent upon the question decided, the court further said:

> Without undertaking, therefore, to further define a "lateral, branch line of railroad" we are clearly of opinion that the road of this Traction Company does not come within any reasonable meaning of the language used in the statute to describe the class of roads entitled to a switch connection. And if we are right in this view, the Commission was without jurisdiction to make the order in question.
>
> "A preliminary injunction was therefore properly ordered and the motion to dismiss will be overruled." (Record, p. 31.)

This being the only issue upon which the opinion and decree of the Commerce Court was based and from which an appeal was taken, the assignment of errors, several in number (record, pp. 34 to 36), may be stated under two general propositions:

(1) The court erred in holding that the Cincinnati & Columbus Traction Company is not a lateral,

branch line of railroad, as to the lines of the appellees, within the meaning of section 1 of the act.

(2) The court erred in holding that the Commission did not have power to enter the orders in question:

(*a*) Requiring the switch connections, and

(*b*) Establishing through routes to part of the stations on the Traction Company's line.

BRIEF AND ARGUMENT.

I.

The purpose of the act and its application to the Traction Company.

The Traction Company is a common carrier engaged in the transportation of interstate commerce, its line extending from Norwood to Hillsboro, about 53 miles in the state of Ohio; it serves a territory and shippers who are making shipments to points in other states, and receiving shipments from points in other states. These shipments to and from this territory pass over the Traction Company's line to appellees' lines, and there, either at Norwood or at Hillsboro, are transferred by hand or truck, and proceed on their interstate journey. The expense of the transfers is either in the local freight rate or is a special charge paid by the shippers. Delay is occasioned by these primitive methods of transferring interstate freight, which works to the disadvantage of the shippers. To remedy these defects in interstate transportation facilities the Traction Company and the shippers requested that switch connections be made at each end of the traction line and that

through routes be established. The advantages to the shippers in having the switch connections are, (1) that transfers of less than carload lots can be made directly through the freight station by switching cars containing the shipments to the connecting carrier, without unreasonable delay, and without expense to the shipper; and (2) in case of carload lots, the transfer can be made by switching the car to the connecting line and its movement continued to point of destination. To secure the full benefit of these advantages, through billing over a through route is desirable. Where freight is billed through by a common carrier over connecting lines, all transfers, both as to less than carload lots and carload lots, are made by the carriers, unnecessary delays are prevented, and the territory served is put upon a reasonable equality with other producing and consuming territories.

The purpose of the act.—It is one of the purposes of the act to regulate commerce, as amended, to extend interstate facilities to every producing or consuming territory having "sufficient business to justify the construction and maintenance of" switching connections. No other purpose can be suggested for the provision in Section 1, as amended, providing that these connecting facilities shall be granted by the great trunk lines to the small lateral branch lines of railroad serving the smaller communities. To the big line of railroad these smaller streams are important, draining into its channel the traffic from a larger territory than is adequately served by its main line. When these lateral roads, however, are

of the electric type, a type just coming into extended use and competition with the steam roads, decided opposition is presented by the steam roads against the doing of anything that will put the electric roads upon an equality with the steam roads. This opposition has been pressed upon and met by the Commission in many ways. The Commission, however, has taken the view, obtained from the clear reading of the statute, that Congress recognized and intended to recognize the development of electric roads, especially for short lines into new territory; and while the statute provides that through routes and joint rates may not be established between steam railroads and a street electric passenger railway, it is clear that these interurban roads, carrying both freight and passengers, differing mainly from the steam roads in the motive power used, are now to be treated as a part of the great transportation system of the country. They are especially adapted, because of less expense in construction and operation, to serve the smaller rural communities not properly or adequately served by steam roads. But this service to the rural community will not be complete unless interstate shipments can be made over these lines in connection with the trunk lines carrying the great volume of interstate traffic.

The Traction Company in this case serves a community not large, but having a sufficient traffic to warrant the switch connection. Communities are not overlooked by the state because they are small. The only question involved, under the statute, upon

this point is whether there will be sufficient traffic to warrant the expenditure occasioned by a switch connection. This is a question of fact about which due investigation was made by the Commission, and its finding upon this fact is clear and conclusive. (Record, at the bottom of p. 11 and top of p. 12; *I. C. C.* v. *D., L. & W. R. R. Co.*, 220 U. S., 235.)

II.

Definition of lateral railroads.

The terms "lateral railroad" and "branch railroads" or "lateral branch railroads", occur frequently in special charters and general incorporation acts. In fact, until the incorporation of this phrase into the act to regulate commerce by Congress, it occurs in judicial opinions only in connection with condemnation cases, and the inquiry in these cases has been to ascertain whether the railroad company had the power under its charter, or a general act of incorporation, to build a lateral or branch railroad of a given kind or character. In all these cases the connection was made with the main line.

> It is true, as claimed by appellant, that whether a particular portion of a railway is a branch railroad or not does not depend upon its length or direction; but it must be connected with a main line, or constructed, in order to be such. (*Calling* v. *Griffin*, 56 Pa. State, 305; *1 Wood Railway Law*, section 189; *Biles* v. *Tacoma O. & G. H. R. R. Co.*, Supreme Court of Washington, Jan. 3, 1893, 32 Pacific Reporter, 211.)

And that:

> A lateral road is another name for a branch road; and a lateral or branch road is one which proceeds from some point on the main trunk between its termini, and is an appendage to and properly a part of the main road. *Newhall* v. *G. C. U. R. R. Co.*, 14 Ill., 273; *C. & E. I. R. R. Co.* v. *Wiltse*, 116 Ill., 449; *L. S. & M. S. Ry. Co.* v. *B. & O. & C. R. R. Co.*, 149 Ill., 272.

These cases differ from those arising under the act to regulate commerce in this, that the lateral lines referred to in the state cases were already connected with the main line and in that respect were "branches," while cases arising under the act to regulate commerce involve an order directing that a connection be made; after the connection is made they are in a sense branches or connecting lines. In all cases, however, the question of what constitutes a "lateral" road is the same.

The following cases are instructive in so far as they define the word "lateral" and show the disposition of the courts to give in each case force and effect to the spirit and purpose of the law.

The Supreme Court of Pennsylvania had before it a case involving the exercise of the power of eminent domain to construct an extension from the terminus of the Pittsburgh-Thomasville Railroad. The company was authorized "to survey, locate and construct one or more branches of railroad, extending from any point or points in any county through or in

which said main line passes, or in any adjoining county, with a view to the development of the territory within said limits, and furnishing an outlet for its production." The court said:

> Is the proposed extension a branch within the meaning of the act? We think it is. We can not agree that the definition of such a structure shall depend either upon its length or direction * * * The mistake is found in giving too narrow a definition to the word "branch." * * * The branching power given by the 9th section of the act of 1868 is sufficiently broad and comprehensive to authorize the construction of the road in question as a branch and there is no valid reason why it may not be constructed from the terminus as well as from any other point of the main line of the road.
>
> *McAboy* v. *Pittsburgh, etc., R. R. Co.*, 107 Pa. St., 558; American and English Ry. Cases, Vol. 20, p. 314.

In another case in the Supreme Court of Pennsylvania construing a statute which provided that, "Any company incorporated under this act shall have authority to construct such branches from its main line as it may deem necessary to increase its business, and accommodate the trade and travel of the public." Held:

> The main line, although less than four miles long, connects the Baltimore & Ohio and the Philadelphia & Reading systems, and thus becomes an important piece of road, over

> which a large amount of traffic must necessarily pass. * * *
>
> It is not necessary that we should discuss the difference between a branch and an extension. * * * We are clear that this is a branch, and that its character as such is in no sense affected by the incident that, to reach its objective point, it makes a detour that increases its length over that of the main line.
>
> Vollmer's appeal, 115 Pa. St., 166; 8 At. Rep., 223.

A case in the Supreme Court of West Virginia, brought to condemn a right-of-way to construct a branch or branches, was considered. The statute of West Virginia provided: "Any railroad company organized under this chapter may build and construct lateral and branch roads or tramways."

The proposed branch connected with another branch of the main line. The court said:

> Nothing is clearer under our statute than that the railway company may legally construct a branch of a branch, or, that two branches may have a common stem leading into the main line, provided neither exceed fifty miles in length from such main line.
>
> *Wheeling Bridge & T. Co.* v. *Camden C. Oil Co.*, 35 W. Va., 205; 13 S. E. Rep., 369.

The statute of New Jersey provided: "That whenever the railroads of any railroad corporations * * * intersect of cross each other, or shall approach each other within a distance of one mile, * * * it shall be lawful for either corporation to determine

upon constructing a branch railroad or railroads so as to effect such connection."

The Court of Errors and Appeals of New Jersey said:

> It is no objection to the legality of the proposed branch railroad that it will leave the main line on one side of the connection and return to it on the other. * * * The authority is to construct "a branch railroad or railroads so as to effect such connection" and a connecting loop is within the authority.
>
> *Attorney General* v. *Greenville & H. Ry. Co.*, 62 N. J. Eq., 768; 48 At. Rep., 568.

The Court of Appeals of Maryland considering a clause in the charter of the Baltimore & Ohio Railroad Company which authorized "lateral railroads, in any direction whatsoever, in connection with said railroad from the City of Baltimore to the Ohio River," said:

> The learned judge of the Circuit Court reached the conclusion that the proposed road was not a lateral railroad * * * and stated "any branch, therefore, from the main line that is not a feeder of the port of Baltimore is not a lateral railroad as contemplated in the charter. * * * I do not believe from the evidence that the proposed branch will be a feeder of the main line between Baltimore and the Ohio River."
>
> The testimony taken in this case shows that the proposed road will run through a territory without east and west railroad facilities, and that it will cross and connect with the Western

Maryland and Northern Central and the Maryland and Pennsylvania railroads, thereby interchanging traffic with all these roads, both giving and receiving it, and directly tending to develope the trade and transportation of the region it traverses. Yet, upon the theory adopted below, these connections can not be made under the charter. But that this was not the policy of the State in granting this charter appears to us to be conclusively shown by section 23 * * *.

But we have yet to inquire what is the true meaning of the term "lateral railroad". In most of them [charters] the same general power is given to construct lateral roads and in many the language used is very nearly the same. * * * In *Newhall* v. *Galena & Chicago Union R. R. Co.*, 14 Ill., 273, the court said: "A lateral road is one proceeding from some point on the main trunk between its termini. This is a road lateral to and proceeding from the main road. This is a simple fact. Ingenuity can not remove or disprove it."

B. & O. v. *Waters*, 105 Md., 39; 66 At. Rep., 685.

In the Supreme Court of Virginia a question arose as to the right to condemn land to connect the main line of the Richmond, F. & P. R. R. Co. with the Richmond & Petersburg Railroad Co., under a provision of the company's charter which provided, that the company "may make or cause to be made, branches or lateral railroads, in any direction whatsoever, in connection with the said railroad, not exceeding ten miles each in length."

The court said:

> What is a lateral or branch road? The word "lateral," according to Webster means "proceeding from the side; as, the lateral branches of a tree; lateral shoots;" and this I take it is the sense in which this word is to be understood when we speak of branch or lateral railroads. A lateral railroad is nothing more nor less than an offshoot from the main line or stem. * * *
>
> It seems to us, however, perfectly clear that we should hold in accordance with the unbroken current of decisions, as well as upon principle, that the mere fact that the contemplated road runs in the same general direction with the main track will not deprive it of the character of a branch or lateral road.
>
> * * * Upon what principle, then, can we hold that because of the mere circumstance that this branch road connects those two railroads that it ceases to be a branch or lateral road and is not authorized by the charter? We know of none. It may be that this right to make of a branch road a connecting link between two railroads may have been one of the unforeseen results of the grant of power, but as it does not change the terminus, serves as a feeder to the main stem, assists the company to develop the country through which it passes, and tends to promote the public convenience, both as to trade and travel, it can not be regarded as obnoxious to any of the objections that have been urged against it.
>
> *Blanton* v. *Richmond*, F. & P. R. R. Co., 86 Va., 618; 10 S. E. Rep., 925.

This court in a case involving the validity of certain bonds issued to aid in the construction of a branch road said:

> It [the railroad] was expressly authorized "To extend *branch* railroads into and through *any* counties that the directors may deem advisable." For the purpose of aiding in the construction by that company of a road from the junction of the main line with the Pacific Railroad, extending in a northeasterly direction to Booneville, through the county of Howard, the county court of that county, in its behalf and after a favorable vote by the people, made a subscription to the capital stock of the company and issued county bonds therefor. * * *
>
> The subscription was made and bonds issued, in pursuance of a provision in the company's charter which made it "lawful for the county court of any county in which any part of the railroad or *branches* may be, or any county adjacent thereto, to subscribe to the stock of said company * * * and for the stock subscribed in behalf of the county may issue the bonds of the county to raise the funds to pay the same and to take proper steps to protect the interest and credit of the county court;" * * * The railroad was constructed through Howard County as proposed and has been in operation ever since. * * *
>
> And now it is contended in behalf of the county, and no other question is presented for determination, that there was no legal authority for this subscription or issue of bonds.

> The argument in its behalf is that the main road of the company was established on a line south of the Pacific Railroad; that Howard County could not, by subscription, aid in the construction of the main line; and could not, by subscription, aid in the construction of a road from the junction of the main line northeasterly through that county, because such a road would not be a *branch* road but only an unauthorized *extension* of the *main* line.
>
> We are of opinion that the road constructed through Howard County was, within the meaning of the statute, a branch of the original or main line.
>
> *Howard County* v. *Bank*, 108 U. S., 314.

Observe how in each case above cited, the court rendering the decision lays emphasis upon the fact that the lateral road may connect at any point with the main line and becomes a lateral road by reason of its being (*a*) a feeder to the main line, and (*b*) that it tends to develop the trade and transportation of the region it traverses. In the Maryland case emphasis is laid upon the fact that it connects with other railroads and so furnishes to the territory which it traverses railroad connections, thereby promoting the public convenience both as to trade and travel.

The provisions of section 1 of the act to regulate commerce are clear and explicit:

> Any common carrier subject to the provisions of this act, upon application of any lateral, branch line of railroad, or of any

shipper tendering interstate traffic for transportation, *shall* construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, or where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; * * *

If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the commission, as provided in section 13 of this act, and the commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section 15 of this act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the commission, other than orders for the payment of money. (Concluding paragraph section 1, as amended.)

The clear purpose, and object in view, in this statute was the same as in the statutes construed in the cases above cited, namely, to develop trade and

commerce and accomodate the shippers in communities and territories not otherwise provided, or not adequately provided, with railroad facilities. No other purpose can be conceived for this legislation. This purpose then should dominate the construction to be given to the word "lateral" as used in the act.

In discussing the second ground of complaint, the commission, in its report, said:

> None of these towns is within less than approximately five miles, and two or three are ten miles or more by the country roads from any station on the defendant lines. To say that such places are already reasonably well served by either of the defendants is to announce the definite proposition that a wagon haul of from five to ten miles is not an improper burden to put upon an interstate shipper. But in such a view we are not ready to concur as a fixed rule, even when the country roads are so good as the roads in this territory are said to be. While we have little sympathy with, and will not ordinarily lend our aid to, an effort by one road to secure traffic that is reasonably tributary to another road by compelling the latter to join with it in through routes and rates, we shall not permit the theory as to what traffic is tributary to a road to be pushed to such an extreme as to impose an undue burden upon shippers. Confining our ruling to the special facts of the case and to the points last mentioned, we think the prayer for through routes should be granted.

This description of the communities in the territory traversed by the Traction Company, when read in the light of the facts in the cases above cited, shows satisfactorily that the Traction Company's line is performing important service for shippers in a territory not otherwise adequately provided with railroad facilities.

That these towns are small and that the Traction Company's line is a minor road, does not impress the case. The words of Mr. Justice Johnson in Gibbon *v.* Ogden (9 Wheaton 1, 196) are appropriate. He said:

> The great and paramount purpose [of the Constitution] was to unite this mass of wealth and power for the protection of the humblest individual; his rights, civil and political, his interests and prosperity, are the sole end; the rest are nothing but the means.

While the main purposes of the act to regulate commerce, as stated by this court in several opinions, is to prevent discrimination and favoritism between shippers and localities and to secure reasonable interstate rates, it is also the purpose of the act to extend interstate commerce to every community, by uniting and using all existing instrumentalities, and by raising all agencies to the highest efficiency.

This provision in section 1 of the act refers to minor or smaller lines of railroad; it has no reference to junctions between the great trunk lines. It is intended to secure, as the words clearly indicate, a current of commercial and industrial life to out-

lying communities which are served by these short and less important lines. The underlying question really is whether or not a community is already served by interstate commerce, or whether they are adequately served.

It is a mistake to regard these minor lines simply as small feeders to the main line as though they were created for the benefit of the larger railroad. The act to regulate commerce, while not antagonistic to railroads, and properly construed means their development and growth, is primarily for the purpose of building up the population and wealth of every community within the State. The main lines of transportation are the great arteries of commercial and industrial life, and send this life out through the "branches" to smaller communities. The word "lateral" therefore, as used in this statute, does not depend upon particular direction, or point of contact, or non-competition; but it does mean, properly defined and construed, a line which reaches a territory not adequately served by the main arteries. The time was in the history of the country when a wagon haul over country roads of five or ten miles to a railroad was not regarded as so very disadvantageous, but we have reached the point in competition and extension of trade when it is essential to the development of every community that it should have at its door the best possible means of interstate transportation; and it is to secure this that the statute seeks, in all proper cases, to compel the great lines of railroad to make connection with these lateral lines in

order that every part of the State may be served in the most advantageous manner by these great instrumentalities of interstate commerce.

This honorable Court in the case referred to, Interstate Commerce Commission *v.* D. L. & W. R. R. Co., (216 U. S., 521, 537) while not deciding the point in issue in this case, certainly recognized in the language used, the thought here expressed. Mr. Justice Holmes, speaking for the Court, said:

> There certainly is force in the contention that the words of the statute mean a railroad naturally tributary to the line of the common carrier ordered to make the connection, and dependent upon it for an outlet to the markets of the country, * * * but primarily, at least, to provide for shippers seeking an outlet either by a private road or a branch.

In this case it is also recognized that the purpose of the statute was primarily to serve the shippers; and under the statute as it then read this court held that only shippers could ask for such a connection. Since that decision was rendered Congress, recognizing the fact that the lateral road, in such a matter, represented the shippers, amended the act so as to provide that the complaint might be filed by the lateral road. It still remains true, however, that the primary purpose of the act is to serve the shippers in a given territory who are not otherwise properly served.

Taking this view and giving this broad construction to the statute, the commission had power to

order in the switch connections, provided each connection "is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same."

Whether the connection is practicable and safe, and whether there is sufficient business to warrant the expense, are questions of fact. Regarding the determination of these facts the act provides, "that the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor." These are not questions of law for the court to determine. As stated by this court in I. C. C. *v.* D. L. & W. R. R. Co. *supra*, "the statute creates a new right not existing outside of it"; and it provides a tribunal that is to determine the questions of fact.

This court has said, in several cases, that in the determination of these questions of fact arising under the act the conclusions of the Commission are final and not reviewable by the Commerce Court.

> *Baltimore & Ohio R. R.* v. *Pitcairn* (215 U. S. 481).
>
> *Int. Comm. Comm.* v. *D. L. & W. R. R.* (220 U. S. 235, 251).

Upon these questions of fact the Commission, after reviewing the evidence presented by the parties before it, and making a physical examination of the roads and their relation to each other for the purpose

of determining the practicability of the connection and the operation thereof, found as follows:

> A physical connection with the defendant, the Baltimore & Ohio Southwestern, at one time existed at Madeira and also at a point spoken of in the record as Hillsboro Junction. At the same time there was also a connection with the line of the Norfolk & Western at the latter point. * * * It is not to be doubted that it is reasonably practicable to restore these connections at those points or to put connections in elsewhere, or that when restored or put in elsewhere they can be operated with safety. Nor can it be doubted that there will be sufficient traffic to and from points on the line of the complainant reasonably to compensate the defendants for constructing, maintaining, and operating such switch connections with the complainant. (Record, pp. 11 and 22.)

The Commission further found:

> In conclusion we find that the complainant is entitled to a switch connection with the line of the defendant, the Baltimore & Ohio Southwestern Railroad Company, at Medeira, and to a switch connection at or near Hillsboro with the line of that defendant, as well as with the line of the Norfolk & Western Railway Company. (Record, pp. 15 and 16.)

And in the order it is provided:

> The expense of installing such connection to be borne by said complainant [the Traction Company].

The learned judge who wrote the opinion of the Commerce Court fell into a singular error by failing to discriminate between the two divisions of the case—the request for switch connections and the request for through routes, either one of which might have been the subject of a separate proceeding. The first complaint is under section 1, which provides for switch connections, the second is under section 15, which provides for through routes. There is no connection or interdependence between these two causes of action. Relief may be granted in either one without reference to the other; switch connections may be ordered in without any reference to the existence or nonexistence of through routes. Through routes may be established, and do exist, where there is no physical connection between the lines, the transfers being made by steamboats, lighters, trucks or other instrumentalities. Facts essential to relief in one case need not exist as to the other. The Commission discussed and determined each complaint separately as clearly appears in the report. Yet in the opinion of the Commerce Court (Record, p. 30) it is stated:

> In considering whether upon this showing the Cincinnati & Columbus Traction Company is a lateral branch railroad, within the meaning of the law, it is to be observed that, according to the test applied by the Commission, it is held to be such as to places and shippers along its line in the intermediate territory between Dodsonville and Boston, remote from and not sufficiently served by the trunk lines,

> but not as to those east or west of there, as the road approaches its termini, where this is not the case. But it is obvious that this is not and can not be the correct criterion. A road is or is not a lateral branch railroad, according to the relation which it bears to the line with which a switch connection is asked. And this relation is one of road to road, and not of shippers or territory. (Record, p. 30.)

The Commission applied no such test. It took up in its report, first, the application for a switch connection, considered the road as a whole, and reached its conclusions thereon independently and before considering the needs of particular stations for through routes. (Record, p. 12.) The Commission then proceeds to say: "The complainant *also demands*, as we understand the petition, through routes and through rates to and from all interstate points reached by the defendants' lines and their connections." It then considers the condition of the particular stations and discusses their needs for through routes; examines to see whether they have adequate through route connections over the main lines, *not with a view of determining whether the line of the Traction Company is a "lateral" line, but for the purpose of determining whether the Commission should order in through routes at these stations.* The Commerce Court evidently misconceived the nature and scope of the proceedings before the Commission and the purpose of the inquiry under each complaint.

The opinion of the Commerce Court proceeds upon another theory, which, if correct, would prevent connection with any lateral road. After calling attention to the fact that for some distance from each connection the stations or communities are severally served by the main line, the opinion says:

> For half this distance also one or other of the steam roads draws its local traffic from and serves substantially the same territory as the Traction Company. And so clearly are they within the limits named, c mpeting lines, that admittedly any attempt to consolidate the Traction Company with either of them would offend against the state if not the federal law. (Record, p. 30.)

This condition must exist as to every lateral line. If it operates to prevent the granting of the relief provided for in the statute, then the law becomes wholly ineffective and the construction destroys the statute. What is meant by the phrase "would offend against *the state* if not the federal law" is not apparent. This can not be the law.

Again, the Commerce Court says:

> It may be that some shippers along the line of the Traction Company's road are not so fully accommodated as they might be, as the case stands; and their needs are to be consulted to a certain extent without doubt. But this is not controlling, and their rights have necessarily to be worked out through the road for which in each instance a switch connection is sought, the character of which as a lateral

branch line is only incidentally affected thereby. (Record, p. 31.)

If the meaning of the last part of this quotation is understood, it must mean that the fact that a community is not adequately served with interstate transportation is not a very material matter in determining whether a road is a lateral road; that this question must be worked out mainly in reference to the larger roads whose local traffic may be slightly affected. This judicial attitude is very different from that taken by the State courts in the cases above cited. There the sole question seemed to be whether or not the communities and shippers were to be served, or better served, by the lateral road. One can not read the Federal act with an open mind without being impressed with the fact that Congress had in view primarily the interests of shippers, the growth of communities, the building up of the trade and commerce of the country. And if this be the purpose of the act, then the Commerce Court evidently erred in its conclusion above quoted.

Upon the authorities and for the reasons above cited, we respectfully submit that the Commerce Court erred in holding that the Traction Company was not a lateral, branch line railroad, within the meaning of section 1 of the act to regulate commerce.

As stated in the beginning of this brief, this is the only question decided by the Commerce Court, and upon which its decree is based. The power of the Commission to make the order in question is conceded, if the Traction Company's line is a lateral, branch

railroad. We therefore do not discuss other questions raised in the court below.

III.

The second order establishing through routes.

Section 15, as amended, among other things provides:

> The commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; * * *. The commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character. * * *.
>
> And in establishing such through route the commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through

route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

As we have already noted this branch of the case is entirely separate and independent of the complaint asking for switch connections. The two complaints could have been brought in separate proceedings, or they could be, as they were, joined in one complaint. The orders, however, are separate orders under two independent provisions of the statute. It will be observed from a reading of the statute that the question whether the traction line is a lateral road has nothing whatever to do with the establishment of through routes and joint rates. These interstate routes and rates are not dependent upon the physical connection of the lines over which the through routes run. The transfer may be made through elevators, over docks, or by belt railroads, ferry boats, lighters, or drays. The decree of the Commerce Court, therefore, is clearly erroneous in suspending the order for through routes on the ground that the traction line is not, in the judgment of the Commerce Court, a lateral railroad.

Under this branch of the case, as stated by the Commission (Record, p. 12), there are only two conditions, namely, (a) the Commission may not require any railroad involuntarily to embrace in a through route substantially less than the entire length of its road between the termini of the proposed through route, and (b) it may not establish through routes

and joint rates between a steam railroad and a street electric passenger railway that does not transport freight and passengers. Neither of these limitations is violated by the order. The Commission in its report gives the reasons for establishing these through routes at particular stations on the traction line. Certainly the appellees can not object because the order does not establish through routes at every station upon the traction line. Eliminating the stations nearest the junction points was, as stated in the report, to protect the existing business of the main lines, these stations being adequately served by them. We do not discuss this question further, because the Commerce Court did not rest its decision upon this provision in the statute.

The exception made in favor of street electric railroads clearly shows that it was expected and intended that through routes and joint rates would be established between main-line roads and interurban electric roads. For, as Chief Justice Marshall so well reasoned with reference to powers granted to Congress by the Constitution of the United States, "Limitations of a power furnish a strong argument in favor of the existence of that power." *Gibbon* v. *Ogden*, supra. If the act to regulate commerce did not include electric railways doing freight and passenger business, there was no reason for excepting a particular class of electric railways from the power which Congress was then conferring upon the commission.

No. 648.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES OF AMERICA, CINCINNATI AND COLUMBUS TRACTION COMPANY, AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK AND WESTERN RAILWAY COMPANY, APPELLEES.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR THE UNITED STATES.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1912

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES OF AMERICA, Cincinnati and Columbus Traction Company, and Interstate Commerce Commission, appellants,
v.
BALTIMORE AND OHIO SOUTHWESTERN Railroad Company and the Norfolk and Western Railway Company.

No. ~~1133.~~ 648

APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR THE UNITED STATES.

GENERAL STATEMENT.

The question to be decided in this case is whether the Interstate Commerce Commission erred as a matter of law in deciding that the Cincinnati and Columbus Traction Company is a "lateral branch line of railroad" within the meaning of section 1 of the act to regulate commerce, and therefore entitled to switch connections and through routes with the B. & O. Southwestern Railroad Company and the Norfolk & Western Railway Company.

The Commerce Court has decided that the Commission did so err, and the case comes up on the joint appeal of the United States, the Commission, and the Traction Company.

FACTS.

The appellees, the B. & O. Southwestern Railroad Company and the Norfolk & Western Railway Company, are interstate steam railroads. Between Norwood, Ohio, and Hillsboro, Ohio (where both have stations) they inclose a diamond-shaped territory 50 miles long and, at the widest point, something over 20 miles wide. (See Map, Record at p. 8.) On the long diagonal of this diamond (50 miles) runs the line of the Cincinnati & Columbus Traction Company, an electric, interurban railroad, carrying passengers, freight, and express matter, and serving the territory between the other two lines. The map shows that it crosses the B. & O. Southwestern at Madeira, and the Norfolk & Western at Hillsboro. The statement to the contrary in the body of the petition itself (T. R. 2) must, therefore, be subject to some sort of qualification, possibly that the crossing is not at grade.

Furthermore, at an earlier time, during the construction of the traction line, it did have actual switch connections with both of the other lines; with the Norfolk & Western at Hillsboro, the eastern end of the diamond; and with the B. & O. Southwestern at Madeira, in the west; and also with the B. & O. Southwestern at Hillsboro Junction, 1¼ miles from Hillsboro. (T. R. 11, 30.) Shortly

after the completion of the Traction Company's line in 1905, these switch connections were removed (T. R. 11); but in the year 1908 the Traction Company served upon both appellees a written request for their reestablishment. This was refused. Accordingly, in 1909, the Traction Company commenced formal proceedings before the Interstate Commerce Commission to compel their reestablishment, and also to compel through routes and joint rates applicable thereto.

During the pendency of the proceedings, the Supreme Court of the United States, in the case of *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western R. R. Co.*, (*Rahway* case) (216 U. S., 531), pointed out that, as the statute then stood, it failed to provide for any enforcement of the rights given to the lateral branch lines; that whereas a lateral branch line, as well as a shipper, might request the installation of a track connection, nevertheless proceedings for the *enforcement* of the right could be begun by shippers only. Thereupon two shippers, who resided along the line of the Traction Company and who had previously testified in its behalf, were made co-complainants in the suit. No new evidence was taken thereafter. In the words of the Commission—

> * * * the testimony offered by the defendants seems to cover the entire ground, and in making these objections it is not suggested that any additional testimony is required by the presence on the record of these two

> shippers as co-complainants or that further testimony is in fact available. There was abundant opportunity during the months tnat intervened between the closing of the record and the oral argument to have offered additional testimony," had the railroads desired to do so. (T. R. 11.)

In June, 1910, before either the final argument or the decision in the case, the act to regulate commerce was substantially amended; first, in section 1, by giving the Commission power to compel the installation of switch connections on the application of *lateral branch railroads* as well as on the application of shippers, thus curing the defect in the act noticed in the *Rahway* case; and second, in section 13 and section 15, by giving to the Commission that plenary power to act upon its own initiative which will be discussed hereafter.

In March, 1911, the Commission made a report in said proceeding to the effect that the Traction Company was entitled to the switches and through routes requested but making no formal order. The railroads, however, neglected to conform to the admonition expressed in this report, and in December, 1911, a formal order was entered commanding them to install switch connections at or near the points where they had previously existed.

In so far as the order relates to through routes, it is somewhat complicated. It divides the stations on the line of the Traction Company into three groups. The stations near the termini, where the

diamond narrows at either end, were refused through routes or joint rates on the ground that by means of the two steam railroads they already had adequate through routes to the main arteries of interstate commerce. But the stations in the central group (between and including Boston and Dodsonville) were given through routes because the shippers in that region had no other reasonable outlet, and as a practical matter must either use the lines of the Traction Company or remain bottled up altogether.

No new joint through rates were prescribed, the Commission acquiescing in the suggestion of the Traction Company that the rates applicable to the through routes should be merely the sum of the locals.

To set aside this order the steam railroads sued in the Commerce Court. The respondents filed motions to dismiss, which were overruled upon the ground that switch connections could be given only to "lateral branch lines," and that as a matter of law the Traction Company could not be a lateral branch line in relation to these railroads because as to the points near the termini it was a competitor.

This ground going to the merits, the parties stood upon the motions to dismiss and the Commerce Court entered a final order, from which the respondents below now appeal.

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FIRST POINT.

The Commission did not err in finding that the Traction Company is a lateral branch railroad within the meaning of the act to regulate commerce.

So far, of course, as the character of the Traction Company is dependent upon facts it was exclusively for the Commission to determine (*Crane Iron Works* v. *United States*, Commerce Court, June 7, 1912), but the court below was here of opinion that the Commission had misinterpreted the legal meaning of the words "lateral branch line of railroad." In brief, the court held upon an inspection of the map that because there is a section at the ends of the diamond, where the Traction Company's diagonal finds its termini, in which the main line and the Traction Company serve the same municipalities, and in a limited sense must be competitors, it necessarily follows that the diagonal *can not* be a lateral branch line within the meaning of the statute. It is difficult to perceive just what peculiar features of this geometrical figure make that result inevitable.

It can not be that a line is "a lateral branch line" within the meaning of the statute only in case it approaches the trunk line at right angles—lest, otherwise at some point a shipper might choose to make initial delivery to the lateral instead of the trunk line. In every conceivable case there must inevitably be a certain competitive area near the junction of two lines, whatever the angle of their approach, and even if the approach is at the exact right angle.

But these words, "lateral branch line," are words of art and have long been used in American statutes, and they have never been construed as importing the limitation given them below. Presumably they were used by Congress in their already established meaning, under which the length, direction, or angle of approach, has little to do with the question. In regard to this particular situation, the cases clearly demonstrate that if either of the petitioning roads were attempting to build the line of the Traction Company under a charter provision permitting it to build lateral branch roads the construction could not be enjoined as *ultra vires.*

Newhall v. *Galena, etc., R. R.* (14 Ill., 273, 274).

> Attempt to enjoin, as ultra vires, the building of an offshoot at an acute angle from the main line to connect with another railroad 40 miles away. Held: A lateral road; intra vires.

McAboy's Appeal (107 Pa. St., 548, 557).

> An extension 500 feet long from the terminus of the main line along the same direction was held a branch line. "We can not agree that the definition of such a structure shall depend either upon its length or direction."

Vollmer v. *Schuylkill, etc., Ry. Co.* (115 Pa. St., 166).

> An addition was held to be a branch line, though *double* the length of the original line. The relative importance of the two can not be measured by their length alone.

B. & O. R. R. v. *Waters* (105 Md., 396).

> A mere loop or cut-off—beginning and ending on the main line—held a *lateral* road.

Greenville & Hudson Ry. Co. v. *Grey* (62 N. J. Eq., 768, 770).

> An offshoot which returned again to the main line, held a branch, though only 1¼ miles long, parallel to the main line, and only 225 feet away.

Florida, etc., R. Co. v. *Pensacola, etc., R. Co.* (10 Fla., 145, 165, 169).

> The word "lateral" held to *prohibit* a road connecting with the main line at right angles.

Blanton v. *Richmond, etc., R. R.* (86 Va., 618).

> Where, by charter, power was given a railroad to construct "branch or lateral roads," such power was held to authorize a branch running in the same general direction as the main line, and the fact that it would incidentally connect the main line with another railroad did not prevent it from being a branch road.

This broad interpretation of the words "lateral branch line" not only accords with the statutory significance encrusted upon these words at the time of their adoption by Congress, but it is necessary to the accomplishment of the remedial purposes of the act. These purposes were already stated by this court in the *Rahway case, supra,* where the court said:

> It is plain from the provisions of the act, the history of the amendments, and justice,

> that the object was * * * primarily at least to provide for *shippers seeking an outlet* * * *. (216 U. S., p. 537.)

It seems that the court below did not give due weight to this plain and controlling remedial purpose. Indeed, the opinion seems to state a contrary view, that the necessities of the shippers were not the primary concern of Congress:

> It may be that some shippers along the line of the traction company's road are not so fully accommodated as they might be, as the case stands; and their needs are to be consulted to a certain extent without doubt. But this is not controlling, and their rights have necessarily to be worked out through the road for which in each instance a switch connection is sought, the character of which as a lateral branch line is only incidentally affected thereby. (T. R., p. 31.)

Having regard to the true purpose of Congress as recognized by this court in the case above cited, and also having regard to the old-established meaning of the words, the test whether a given road is a lateral branch road must be this:

Does it as a principal thing serve shippers to whom a track connection is necessary to give them reasonable access to the main arteries of interstate commerce?

This test excludes the existing interstate trunk line, for that is both a main artery itself, and as a practical matter always does connect with other arteries. It excludes also the short line built as a

mere competitor. On the other hand it secures fulfillment of the purpose of Congress to prevent shippers from being bottled up and excluded from interstate commerce.

Under this test the character of the traffic along this diagonal must have an important bearing. It might be almost all through shipments from one terminus to the other, i. e., almost all competitive. On the other hand it might be principally shipments between the intermediate places and the termini, or between the intermediate places and points far out along the main highways of interstate commerce, in which case would it not be proper for the Commission to say that this railroad is *in the main* and in its dominant character, a feeder, a branch, the representative of "shippers seeking an outlet"?

In other words, whether this Traction Company is a lateral branch line, or so much an independent rival and actual competitor that to give it track connections would be to "issue a roving commission" to descend upon the main lines, is a question that can not be predicated merely upon the geometry of the situation.

Assuming that it could be tested so simply, the Commission here was quite as well justified by even the mere geometry in reaching its conclusion as to the dominant quality of this road as was the court below in reaching the opposite conclusion. That sort of judgment is one of the very things in respect to which the Commission is especially trained and expert and intended to be final.

But the whole question is one of degree dependent upon a considerable mixture of factors—geometry, distribution of population, character of industries, habits of traffic, practical demands and necessities for outlet, and so on. Variations in these factors determine whether essentially and truly the line is a feeder or an independent competitor, and the conclusion of the Commission upon that question of fact was not properly to be reversed by the court below merely because it drew contrary inferences from a view of *one* of the factors.

The opinion below also takes the view that the Commission found the Traction Company to be a lateral branch line as to its middle section and not a lateral branch line as to the end pieces, and it considered that this was an error of law because the line must be either one thing or the other and can not be both. (R., p. 30.) This seems to us a misconception of the Commission's position. It did not find that some of the road was lateral branch and the rest of it not lateral branch. It found that the whole thing in its total character was a lateral branch line, though having (as every such line must) an incidental competitive territory. The sole purpose and occasion for its making a distinction between different points on the line was in reference to the requirement of through routes, which is a totally separate matter. Through routes run from point to point and depend upon considerations affecting the particular points. "Lateral branch lines" depend upon the dominant character of the lines themselves as wholes. The

Commission held that this was a lateral branch line *as a line;* and then in considering the rights of its various stations to through routings and joint rates it followed its usual course of refusing such routings to such points as were in competition with the other road and already had the through routings over the line of that other road. This is fully explained in the report of the Commission. (R., p. 12.)

Incidentally the fact that this order would give *two* outlets, one with each trunk line, would not be conclusive of its invalidity. It might well be, within the meaning of the statute, a branch line as to both, as was indeed the case with the lateral branch roads concerned in *Newhall* v. *Galena, etc., R. R., supra,* and *Blanton* v. *Richmond, etc., R. R., supra.* In the *Rahway case* Mr. Justice Holmes, though admitting *obiter* that there is force in the argument that the railroad there in question, a road only 10 miles long, which already had track connections and joint routes with two other main roads, could not be regarded as a lateral branch of a third, carefully limited that doctrine, saying:

> On the other hand it would be going far to lay down the universal proposition that a feeder might not be a lateral branch road of one line at one end and another at another. (216 U. S., p. 537.)

This case falls within the saving qualification. The two main roads here in question, as plainly appears from the description in the first two pages of the petition (Rec. 1, 2), serve two wholly different regions

drawing from this portion of Ohio, the one into Kentucky, Illinois, and Indiana and the other into Kentucky, Virginia, West Virginia, Maryland, North Carolina, and Tennessee. Access to one would not be at all equivalent to access to the other. And so the Commission must have found, or it would not have given connections with both.

And even if not entitled to connections with both lines, it might at least have connections with one.

SECOND POINT.

The order does not lack the technical prerequisites as to proper parties and prior formal request in writing.

The opinion below suggests a further difficulty, namely, that even if the Traction Company is held to be a lateral branch line, nevertheless the Commission had no power to make the order because of an alleged failure to observe certain technicalities in invoking its jurisdiction. The petitioning railroads alleged that they were entitled to, but never received, a formal application in writing. They admitted that the Traction Company did make such an application prior to the proceedings before the Commission. But the contemporaneous decision of the *Rahway* case (216 U. S., 531) pointed out that owing to a defect in the statute only *shippers* could apply to the Commission to compel track connections. Immediately after that decision, however, two shippers who had taken an active part on behalf of the Traction Company in the proceedings before the Commission added their names as co-complainants there, and a little

later still the defect in the act was remedied so that the lateral branch line could apply in its own name. No further request in writing was made, however, either by the Traction Company or by the shippers.

The petitioning railroads say that since the letter of the Traction Company was written at a time when it had no rights, and since no shipper has made any formal written request whatever, they have been summoned before the Commission without the legal warning to which they were entitled.

To that ingenious argument the Commission gave the following valid answer. Even before the amendment of the act, the *duty* to install switch connections arose as well out of application by the railroad as out of application by the shipper. Section 1 of the act read:

> Any common carrier subject to the provisions of this act, *upon application of any lateral, branch line of railroad*, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection, * * *

The difficulty pointed out by the court in the *Railway* case is one affecting the *remedy* only. The provision as to the *remedy* was as follows:

> If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper such shipper may make complaint to the Commission, * * *

The amendment of 1910 changed this provision as to the remedy by inserting after "shipper" in each instance the words "*or owner of such lateral, branch line of railroad,*" omitted in the act as first drawn.

If, then, there was an existing duty even before the amendment, and the amendment, by curing the defect in the remedial section of the statute, provided a means of enforcing that duty, it must have validated *ab initio* the proceedings before the Commission.

The intent of Congress to prevent the recurrence of cases like the *Rahway* case, *supra*, by giving the greatest possible flexibility and freedom to procedure under the act, is demonstrated by the further provision in the amendment of June, 1910—giving the Commission the right of its own motion to institute such an inquiry and to make such an order:

> And the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this act, or concerning which any question may arise under any of the provisions of this act, or *relating to the enforcement of any provisions of this act.* And the said Commission shall have the same power and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this act, *including the power to make and enforce any order or orders* in the case

> or relating to any matter or thing concerning which the inquiry is had excepting orders for the payment of money (act to regulate commerce, sec. 13—as amended June 18, 1910).

And finally the argument, however ingenious from a technical standpoint, certainly has no equitable basis. In the words of the Commission (T. R., 11):

> The letters of these two shippers, in connection with their testimony and their petition to be made cocomplainants, seem to us not only sufficient for all practical purposes to bring them before us as cocomplainants and to serve as their application in writing for a switch-track connection, but sufficient to give the defendants full notice and to advise the Commission of their interest in the questions at issue. On the other hand, the testimony offered by the defendants seems to cover the entire ground, and in making these objections it is not suggested that any additional testimony is required by the presence on the record of these two shippers as cocomplainants or that further testimony is in fact available. There was also abundant opportunity during the months that intervened between the closing of the record and the oral argument to have offered additional testimony. Under such circumstances, to take a technical view of the state of the record would be inconsistent with our general practice of getting at the substance of things when possible; and, inasmuch as the whole situation is fully disclosed and we are in a position to protect the legal and substantial rights of all the parties in

interest, we think we may fairly find, as we do, that the necessary parties complainant are before us and that all the requirements of the act, in order to give us jurisdiction of the subject-matter, have been observed.

THIRD POINT.

The order is not invalid by reason of its provisions regarding the expense of installing the switch.

It has been settled beyond question that it is not a "taking" of railroad property, but a proper exercise of the power to regulate common carriers, to compel them to install a switch connection with another line, provided the circumstances are such as to insure adequate return upon the investment and are otherwise reasonable. This is true even though compliance with the order requires the expenditure of money and the acquisition of land by eminent domain.

Wis. etc., R. R. v. *Jacobson* (179 U. S., 287, 302);

State v. *Chi., M. & St. P. Ry. Co.* (115 Minn., 51, 53);

State v. *C., B. & Q. R. R.* (85 Kas., 649);

See also—

Minnesota, etc. Ry. v. *Minnesota* (193 U. S., 53);

Or. R. & N. Co. v. *Fairchild* (224 U. S., 510).

The Commission, after considering the evidence, found that the conditions prescribed by the statute existed, saying (T. R., 11, 12):

Coming now to the merits, the first inquiry is whether a switch connection, using the

> language of the act, "is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same." On this point we think the record leaves no room for doubt. A physical connection with the defendant, the Baltimore & Ohio Southwestern, at one time existed at Madeira and also at a point spoken of in the record as Hillsboro Junction. At the same time there was also a connection with the line of the Norfolk & Western at the latter point. They were put in when the line of the complainant was under construction, and were removed after its completion, apparently in accordance with a previous understanding to that effect. It is not to be doubted that it is reasonably practicable to restore these connections at those points or to put connections in elsewhere, or that when restored or put in elsewhere they can be operated with safety. Nor can it be doubted that there will be sufficient traffic to and from points on the line of the complainant reasonably to compensate the defendants for constructing, maintaining, and operating such switch connections with the complainant.

The act to regulate commerce, section 1, provides that where the Commission issues an order compelling a trunk line to install track connections it shall also "*determine as to * * * reasonable compensation therefor.*" In the present case the Commission directed simply that the trunk line roads

> construct—maintain and operate during a period of not less than two years—a switch

> connection for the transfer of interstate traffic * * * the expense of installing such connection to be borne by said complainant. (T. R. 4.)

The objection that this order is defective in that it does not fix in express figures the sum which the railroads are to receive, and provide security for its payment, proceeds from the wholly mistaken analogy of eminent domain proceedings. This is not eminent domain, but the regulation of a common carrier. While it may well be that in eminent domain the compensation must be provided for in advance, and secured to the owner of the property, that rule has no application here. The Commission could lawfully have thrown the entire expense upon the railroads had it chosen; and if the whole expense, *a fortiori* it could compel it to incur without security the preliminary expenses of construction, the ultimate burden of which would rest upon another. A case almost directly in point is *State* v. *Chi., M. & St. P. Ry. Co.*, 115 Minn., 51. There the State commission directed the installation of track connections with a stone quarry, the railroad to bear the expense of installation provided the quarry owner bore the expense of grading the right of way. The road appealed on the ground that the expense was so inequitably apportioned as to be a taking. The court said (p. 53):

> The mere fact that compliance with the order will impose a pecuniary burden upon the appellant does not necessarily affect its

> validity; for the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character. *It would have been competent for the legislature to have placed upon the railroad companies the entire cost of putting in side or spur tracks ordered in the exercise of the police power.*

So also in *Wis., etc., Ry. Co.* v. *Jacobson* (179 U. S., 287) the Commission, upon the petition of a shipper, compelled the two unwilling railroads to install and operate a switch connection and to bear the entire expense themselves; and this court upheld the Commission.

In the present case the trunk lines have a right to expend a reasonable amount in installing switch connections. If the Traction Company, after the completion of the connections, should refuse to pay, or should contest the items of expense, the proper remedy would be to ask the Commission for a reparation order, which, being given after hearing, would be a proper basis for a suit in court. It is wholly unreasonable to suppose that in every case the Commission must designate in advance the exact number of dollars the trunk line shall expend and the branch lines shall repay.

If the railroads conceive that they are entitled to security, their course is to present their claim in this respect to the Commission, and not having done so, they have no standing to ask the annulment of this order. The point is one of detail which is not essential to the order and was not suggested to the Com-

mission. Incidentally the counsel for the Traction Company offered in open court to provide ample security.

FOURTH POINT.

The order compelling through routes was constitutional and within the Commission's statutory power.

The act to regulate commerce, as amended, provides, section 15:

> The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; * * *

Compulsory through routes have been upheld in the following cases:

Burlington, etc., Ry. v. *Dey* (82 Iowa, 312, 338).

State v. *Minn. & St. L. R. Co.* (86 Minn., 191, 196).

Jacobson v. *Wis., etc., Ry.* (71 Minn., 519).

In *I. C. C.* v. *N. Pac. Ry. Co.* (216 U. S., 538) an order compelling the Northern Pacific to enter through routes with the Union Pacific was set aside. The court based its refusal solely upon the ground that a satisfactory through route already existed, and apparently *assumed the constitutionality* of the order.

The following language from *Minn. & St. L. Rd. Co.* v. *Minnesota* (186 U. S., 257, 263) shows clearly that the Supreme Court regarded such statutes constitutional:

> We are bound to recognize the fact that modern commerce is largely carried on over railways owned and operated by different companies; that Congress in passing the interstate-commerce act assumed the power to determine the reasonableness of joint tariffs as applied to connecting lines between the several States (*Cincinnati, etc., R. R. Co.* v. *Int. Com. Com.*, 162 U. S., 184), and that, if the power of the State commission were limited to the tariffs of a single road, it would be wholly inefficacious in a large number, if not in a majority, of cases—in fact, that the whole purpose of the act might be defeated. The necessities of this case do not require us to determine whether connecting roads may be compelled to enter into contracts as between themselves and establish joint rates, but so far as applied to contracts already in existence we have no doubt of the power of the State to supervise and regulate them. Such a contract for a joint rate having been in existence when the order of the commission was made, we do not think it was affected by the subsequent withdrawal of the Minneapolis and St. Louis Company. It may also be said in this connection that in *Wisconsin, etc., R. R. Co.* v. *Jacobson* (179 U. S., 287) we held that, under this very act, railways in Minnesota might be compelled to make track connections at the intersections

of other roads for transferring cars from the lines or tracks of one company to those of another, as well as for facilities for the interchange of cars and traffic between their respective lines. The case did not involve the right of the commission to prescribe joint through rates for the transportation of freight between points on their respective lines, but if any inferences are to be derived from the opinion they are in favor of such right. See also *Burlington, Cedar Rapids, etc., Railway* v. *Dey* (82 Iowa, 312, 338).

There is no basis for the suggestion that such an order compels an unwilling railroad to incur the risk of being unable to collect its division of the rate from an insolvent connecting carrier. It can demand prepayment of its charges before accepting the goods if it wishes.

Gamble Robinson Co. v. *Chicago & N. W. R. Co.* (168 Fed., 161; C. C. A., 8th).

So. Ind. Exp. Co. v. *U. S. Exp. Co.* (88 Fed., 659; Aff'd. 92 Fed., 1022; C. C. A., 7th).

Little Rock & M. R. Co. v. *St. Louis S. W. R. Co.* (63 Fed., 775; C. C. A., 8th).

Jacobson v. *Wis., etc., Rd. Co.* (71 Minn., 519, 532).

It is objected further that the order establishing through routes necessarily requires the petitioners to interchange their own cars with the Traction Company without payment for their use or security against destruction, and is therefore void under *Central Stock Yards Co.* v. *L. & N. R. R., 192 U. S., 568; 212 U. S., 132*).

The requirement of "through routes" alone does not require the interchange of petitioners' cars, or anything more than delivery to designated connecting carriers, with or without transshipment, and without further steps on the part of the shipper. Nor does any section of the act to regulate commerce require the petitioners to send their cars beyond their own rails. *Central Stock Yards* v. *L. & N. R. R. Co.* (192 U. S., 568, 571).

Nor does any other language in the Commission's order require such interchange. The objection is really based upon a misconception of the following paragraph of the order:

> And it is further ordered that defendants, The Baltimore & Ohio Southwestern Railroad Company and Norfolk & Western Railway Company, according as their various lines may run, be, and they are hereby, notified and required to establish and put in force, on or before the 15th day of February, 1912, and for a period of at least two years thereafter to maintain, through routes to and from interstate points to and from all points on the complainant's line between and including Boston and Dodsonville, in the State of Ohio, in order that shippers at and between those points may have access to and from interstate points by interchange of cars under through billing and through charges based upon the rates of the respective carriers herein to and from the junction points established by this order, the complainant carrier having filed its local rates with this Commission as applicable to interstate movements over such through routes.

The words "in order that shippers at and between those points may have access to and from interstate points by interchange of cars under through billing" do not require the petitioners to send *their own* cars over the lines of the Traction Company. The passage quoted does suggest a reason for the installation of the connection, and once a connection is established the statute would automatically compel the petitioners to receive and haul any loaded cars the Traction Company might offer, if at least they are such as might properly and safely travel over petitioners' lines. It would also compel the petitioners to receive cars tendered by *other* companies to be hauled and delivered to the Traction Company. Such would be merely instances of the tender of goods in appropriate packages and could not be refused. As was said in *Burlington, etc., R. Co.* v. *Dey* (82 Iowa, 312, 328):

> A railroad company, as a common carrier, is required to receive and transport freight offered to it for transportation. The reasons upon which this rule is founded impose upon it the obligation to haul cars of other companies brought to it for transportation over its own road.
>
> Accord; *Rae* v. *Grand Trunk R. Co.* (14 Fed., 401).
>
> *Mackin* v. *B. & A. R. Co.* (135 Mass., 201, 206).
>
> *Peoria, etc., Ry.* v. *Ch., R. I. & P. R. Co.* (109 Ill., 35).
>
> *Hudson Valley Ry.* v. *B. & M. R. Co.* (106 App. D., 375, N. Y.).

Mich. Cent. R. Co. v. *Smithson* (45 Mich., 212).

Numerous cases collected in *Wyman, Public Service Companies* (sections 529, 530).

See also—

Mo. Pac. R. R. v. *Larrabie Mills* (211 U. S., 612).

Penn. Ref. Co. v. *West N. Y. & P. R. Co.* (208 U. S., 208, 222).

Central Stock Yards v. *L. & N. Ry.* (192 U. S., 568, 572.)

This, with the opportunity to transship with maximum facility, furnishes a sufficient reason for installing switch connections. Switch connections were ordered in *Wis., etc., Ry.* v. *Jacobson* (179 U. S., 287, 291), even though interchange of cars could not be compelled.

Of course none of the objections discussed in this point go to the validity of the whole order, but at most, if valid, would require only its modification.

FIFTH POINT.

The Carmack amendment is immaterial.

It was urged below that the order is invalid because it would subject the railroads involuntarily to liability under the Carmack amendment for occurrences on the Traction Company's line, and that this would be unconstitutional.

Obviously, the point is not well taken.

If the Carmack amendment is constitutional, its application can not invalidate this order. If it is not constitutional when applied to compulsory through routes, it can not create the liability objected to. The time to raise the objection is not here, but when petitioners are sued by shippers for such occurrences.

SIXTH POINT.

The order is not void because as to the physical condition of the Traction Company's line, the Commission supplemented the testimony of witnesses by independent investigations.

The petition (T. R., 8) draws attention to the following passage from the report of the Commission (T. R., 15):

> We think that much of this criticism as to the physical condition of the line of the complainant is the reflection of a special view in which the requirements of steam lines with respect to their roadbed and bridges were taken as a basis of comparison. Giving due weight to the testimony of witnesses on each side of the controversy, but basing our conclusions more largely upon our own investigations, we think the complainant will have no difficulty in moving regular line equipment over its road.

Upon the strength of this passage, and this alone, petitioners aver that grave irregularities existed in the proceedings before the Commission, so grave as to render void *per se* any order resulting therefrom. These grave irregularities consisted in sending one of the Commission's examiners to make a personal

inspection of the physical condition of the Traction Company's line, and to report thereon to the Commission. This was in accordance with the Commission's practice in similar cases. Both the petitioners and Traction Company knew that this point was being investigated, and had every opportunity to put before the Commission any and all evidence they had to offer. (R., p. 15.) There was no denial of full hearing. It is the independent investigation petitioners object to.

In *Cederberg* v. *Robison* (100 Cal., 93) appears the following passage, quoted by *Sutherland on Damages*, section 441, note 1:

> Juries are permitted in many cases to exercise their individual judgments as to values upon subjects presumptively within their own knowledge, which they have acquired through experience or observation, *and the objection that no evidence was presented before them upon such subjects is insufficient to defeat their verdicts.*

Even assuming that legal analogies are controlling, why may not the Commission, which is the trier of facts in these cases, also rely upon its own expert knowledge? If it could not do so, much of the advantage to be gained from its long experience would be lost.

When the jury is the trier of facts it may "view" the subject matter in controversy. *Wigmore on Evidence*, sections 1150–1168. Of course the Commission may do the same. And if it may do so

in person, it may do so through one of the expert agents which it is permitted to employ under section 20 of the act. Indeed, in *People* v. *D. & H. Canal Company* (165 N. Y., 362, 365), a statute requiring a "*careful personal examination*" by the State railroad commission prior to the compulsory erection of new freight stations was held satisfied by an investigation through a special examiner.

However, we submit that judicial analogies ought not to be too much relied upon. They have been the basis of over-technical objections in too many of the cases involving appeals from orders of the Commission. We submit that these persistent efforts to confine it to the strict rules of judicial procedure are fraught with the gravest danger to the efficiency of the Commission itself—in the elasticity of its procedure lies the very secret of its usefulness as an administrative body. The Commission is not a court, was not intended to be a court, and ought not to be made a court. The words of Mr. Justice Day in *I. C. C.* v. *Baird* (194 U. S., 25), though uttered in regard to the relevancy of evidence are equally applicable here.

> The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common

> law where a strict correspondence is required between allegation and proof (44).
>
> To unreasonably hamper the Commission by narrowing its field of inquiry beyond the requirements of the due protection of the rights of citizens will be to seriously impair its usefulness, and prevent a realization of the salutary purposes for which it was established by Congress (47).

The act to regulate commerce leaves no doubt as to the intent of Congress to allow the Commission a nonjudicial freedom. It provides (sec. 17)—

> That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.

The Commission itself has so interpreted its powers from the very first. Thus in *Boston Fruit & Produce Exchange* v. *N. Y., etc., R. Co.* (4 I. C. C., 664, 678) the Commission based its decision upon contracts and tariffs which were in its files, but which had not been offered in evidence. *Daish on Procedure before the Interstate Commerce Commission* collects numerous other instances where the judicial rules of evidence have been dispensed with; for example, hearsay (Daish, sec. 137), ex parte affidavits (sec. 144); no principle of estoppel (sec. 136); allowance of secondary evidence (sec. 132).

In *Mo. & Kans. Shippers Ass'n.* v. *M., K. & T. Ry. Co.* (12 I. C. C., 483, 484) the Commission said:

> While its procedure is to some extent judicial in nature, the Commission is essentially

> an administrative body; and in the adjustment of contentious proceedings of this kind, it ought to examine into the real substance of the matter, unembarrassed by considerations that are purely technical.

And in the report in the instant case it said (T. R., 10):

> In the general public interest the Commission has endeavored to simplify its practice and procedure and to perform its functions in a practical way, without permitting merely technical matters to interfere unduly with substantial results.

The petitioners knew that the physical condition of the traction line was being investigated. They put in all the evidence upon the subject that they had to offer. And in a hearing before an administrative tribunal, we submit that that is all they were entitled to. Such has been the holding of this court in regard to other administrative tribunals. The right to confront and cross-examine witnesses and to hear all the evidence adduced has been repeatedly denied.

Origet v. *Hedden* (155 U. S., 228, 237).

The complaint averred a denial of due hearing before the Board of General Appraisers. The court said (p. 237):

> As already stated, plaintiff in the case at bar was invited by the appraisers to present his views in regard to the reappraisement and to suggest questions to be put to the witnesses.

> He did not avail himself of the opportunity, *but insisted on the right to remain throughout the proceedings, to be informed as to all the evidence, and to cross-examine the witnesses as in open court.* This, according to *Aufmordt* v. *Hedden* (137 U. S., 310, 323) and *Passavant* v. *U. S.* (148 U. S., 214), *could not be conceded.* In those cases it was ruled that under the revenue system of the United States the question of the dutiable value of imported articles *is not to be tried before the appraisers as if it were an issue in a suit in a judicial proceeding;* that such is not the intention of the statutes; that the practice has been to the contrary from the earliest history of the Government, and that the provisions of the statute in this regard are open to no constitutional objection.

Tang Tun v. *Edsell* (223 U. S., 673, 677).

An immigration inspector when forwarding to the Secretary of Commerce and Labor the record of the hearing from which an excluded Chinaman has appealed may properly insert therein the results of his own independent investigations upon subjects which the appellant knew were in issue and upon which his witnesses testified.

Oceanic Steam Navigation Co. v. *Stranahan* (214 U. S., 320, 342).

There is no denial of due process when the Secretary of Commerce and Labor, acting upon the report of a medical inspector, exacts a penalty for bringing

into this country persons afflicted with loathsome diseases. The court said:

> * * * it is evident that the statute unambiguously excludes the conception that the steamship company was entitled to be heard, in the sense of raising an issue and tendering evidence * * *.

Murray's Lessee v. *Hoboken Land Co.* (18 How., 272).

The report of a Government auditor was held conclusive upon the existence of a defalcation by a public officer, and distress warrants were properly issued thereon for the seizure of his property.

It would hardly be contended that when the Secretary of War, in a proceeding under Thirtieth Statutes at Large (p. 1154), decides whether a given bridge unreasonably obstructs interstate commerce, he could not consider information furnished him by his engineer officers upon the subjects discussed at the public hearing. See *Union Bridge Co.* v. *U. S.* (204 U. S., 364) and *Monongahela Bridge Co.* v. *U. S.* (216 U. S., 177, 194). Surely the Postmaster General may receive the evidence of his inspectors when he issues a fraud order (See *Public Clearing House* v. *Coyne*, 194 U. S., 497), and the Secretary of the Interior must also be permitted to rely upon his agents when he determines who is an Indian of a particular land-owning tribe (see *West* v. *Hitchcock*, 205 U. S., 80). As was said by Justice Miller in *Davidson* v. *New Orleans* (96 U. S., 97), due

process of law requires "such proceeding in regard to the property as is appropriate in the nature of the case," and nothing more.

CONCLUSION.

The judgment should be reversed and the case remanded with instructions to dismiss the petition.

WINFRED T. DENISON,
Assistant Attorney General.
THURLOW M. GORDON,
Special Assistant to the Attorney General.

SEPTEMBER, 1912.

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No. 648.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES OF AMERICA, CINCINNATI & COLUMBUS TRACTION COMPANY, AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY.

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

CHARLES W. NEEDHAM,
Assistant Solicitor for Interstate Commerce Commission.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1912

INDEX.

CASES CITED.

STATUTES.

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v.
BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY and the NORFOLK & WESTERN RAILWAY COMPANY.
} No. 648.

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

This case involves a decision of the Interstate Commerce Commission holding that the Cincinnati & Columbus Traction Company, one of the appellants herein, is, as to the appellees herein, a "lateral" railroad, within the provision of section 1 of the act to regulate commerce.

STATEMENT OF THE CASE.

This is an appeal from the final decree of the United States Commerce Court in a suit brought by the appellees, petitioners in said Commerce Court, to

prevent the enforcement of two orders made by this appellant, hereinafter called the Commission, requiring the appellees (1) to establish, and maintain for two years, switch connections with the Cincinnati & Columbus Traction Company for the transfer of interstate traffic, and (2) to establish, and for two years maintain, through routes to and from interstate points to and from all stations between and including Boston and Dodsonville, on the line of the Traction Company. The orders were entered on the 13th day of December, 1911, in one decree, and are set forth in full on page 4 of the printed transcript of record herein. The report of the Commission, upon which the order was entered, is to be found upon pages 8 to 16, inclusive, of the transcript of record herein. The first order—requiring switch connections—was made under the provisions of section 1 of the act to regulate commerce, as amended June 18, 1910. The second order—requiring through routes to certain stations—was made under the provisions of section 15 of said act, as amended.

The proceedings before the Commission were instituted upon a complaint by the Cincinnati & Columbus Traction Company, a corporation, organized under the laws of the State of Ohio as an electric railway for the transportation of passengers and freight, as a common carrier, between Columbus and Cincinnati in said state. Its railroad as now constructed and operated extends from Norwood, a suburb of Cincinnati, to Hillsboro, Ohio, a distance of about 53 miles; its line is wholly within the State of Ohio and belongs

to the class commonly referred to as "interurban" electric roads; its complaint before the Commission was filed on January 21, 1909. The complaint, and the evidence taken by the Commission, showed that prior to the filing of the complaint on November 12, 1908, the Traction Company served a written notice on each of the appellees herein demanding that they establish, or permit to be established, switch connections and through routes and joint rates for the interchange of interstate traffic. (Record, pp. 10, 11.) This request being refused, the complaint was filed before the Commission as stated, and the appellees, upon due notice, appeared and contested the right of the Traction Company to have the relief prayed for.

During the pendency of the proceeding before the Commission this honorable court rendered its opinion in *Interstate Commerce Commission* v. *D., L. & W. R. R. Co.* (216 U. S., 531), holding that the Commission could only grant switch connections with lateral roads, under the act as then existing, upon the complaint of shippers. While the proceedings before the Commission were pending and undetermined, certain shippers on the line of the Traction Company addressed letters to the Commission, and gave evidence upon the hearing which, it was held by the Commission, had the effect of joining them in the complaint. (Record, pp. 10, 11.)

Subsequent to the decision by this honorable court cited above, and prior to the determination of the case by the Commission, Congress, by act approved June 18, 1910, amended section 1 of the act, and

provided that the Commission should have power to order a switch connection "upon application of *any lateral, branch line of railroad or* of any shipper tendering interstate traffic for transportation," etc.

After the amendment of the act, the case before the Commission was reopened, and set down for rehearing and argument. (Record, p. 3.)

The case was finally determined by the Commission upon the complaint of the Traction Company, joined in by certain shippers, and under the act as amended. (Report of the Commission, record, pp. 10, 11.) Subsequent to the report the Traction Company filed with the Commission its schedule of local rates to be applied to interstate traffic. (Com.'s Rept., record, p. 16, and petition, record, p. 2.)

The appellee, the Baltimore & Ohio Southwestern Railroad Company, is a consolidated corporation, organized under the laws of Ohio and Indiana, and operating a line of railway extending across said states, the State of Illinois and into the State of Kentucky (petition, record, p. 1). Its line passes through Hillsboro, Norwood and Cincinnati, in the State of Ohio, and it is a carrier of interstate commerce. Between the city of Cincinnati and Hillsboro the line of this appellee makes a detour to the north into Warren and Clinton Counties, returning southerly to Hillsboro in Highland County. (See map, record, p. 8.) The appellee, the Norfolk & Western Railway Company, is a corporation organized under the laws of Virginia, operating an interstate railroad through parts of Ohio, West Virginia,

Kentucky, Virginia, Maryland, North Carolina and Tennessee. It also passes through Cincinnati and Hillsboro, making a detour to the south in the counties of Claremont and Brown, to Sardinia, thence northerly to Hillsboro. (Map, record, p. 8.) This left a large territory, about 15 miles across at its widest section, without railroad facilities. In this territory were villages whose inhabitants could only reach the railroads of appellees by a wagon haul varying from 5 to 10 miles over country roads. The Traction Company line pursues generally a middle and more direct course from Norwood to Hillsboro, and supplies this territory with railroad facilities. (Map, p. 8.) In addition to its local business the Traction Company transports interstate freight and passengers from this territory, but without the benefits of switch connections or through routes and through rates, transferring its traffic either at Norwood or Hillsboro by independent transfers, at the expense of the shippers, to the railroads of the appellees. To facilitate this interstate traffic the Traction Company and shippers asked to have (1) switch connections at Norwood and at Hillsboro upon which to make transfers without expense to shippers; and (2) through routes and joint rates to facilitate the interstate business.

After a full hearing at which the appellees and each of them appeared and submitted evidence, briefs and arguments, and after a physical examination of the several roads and their connections by the Commission, the Commission filed its report in writing, stating

its findings and conclusions, upon each branch of the case, as required by the act, and entered the orders in controversy. The orders required the appellees to establish the switch connections, and the through routes, on or before the 15th day of February, 1912, and to maintain them for two years thereafter. The appellees filed their petition in the United States Commerce Court on January 22, 1912, and a preliminary injunction staying both orders of the Commission was issued.

The United States filed a motion to dismiss the petition. (Record, pp. 20, 21.) The Commission intervened and filed an answer to the petition. As the Commerce Court in its opinion determined the case upon the sole ground that the traction line was not a lateral railroad the answer of the Commission was afterwards, on February 17, 1912, withdrawn by leave of the court, and the Commission joined in, and adopted the motion of the United States to dismiss the petition. The Traction Company also appeared as an intervening respondent, and joined in the motion of the United States to dismiss the petition.

The respondents elected to stand by the motion to dismiss. The Commerce Court rendered its opinion on April 9, 1912 (record, pp. 25 to 31), and on the 19th day of April entered a final decree overruling the motion to dismiss for the reasons stated in the opinion of the court, and perpetually enjoined the enforcement of both the orders in question, treating them as one order. From this decree an appeal was taken to this court.

ERRORS ASSIGNED.

Several questions were raised in the Commerce Court which that court did not determine for the reasons stated in the opinion as follows:

> These are serious objections which would have to be carefully considered except for the conclusion which we have reached on the underlying question, viz, whether the Traction Company's road is a "lateral, branch line of railroad" within the meaning of the statute, which, if found against that company, is conclusive. (Record, p. 28.)

And, treating the two orders as dependent upon the question decided, the court further said:

> Without undertaking, therefore, to further define a "lateral, branch line of railroad" we are clearly of opinion that the road of this Traction Company does not come within any reasonable meaning of the language used in the statute to describe the class of roads entitled to a switch connection. And if we are right in this view, the Commission was without jurisdiction to make the order in question.
>
> "A preliminary injunction was therefore properly ordered and the motion to dismiss will be overruled." (Record, p. 31.)

This being the only issue upon which the opinion and decree of the Commerce Court was based and from which an appeal was taken, the assignment of errors, several in number (record, pp. 34 to 36), may be stated under two general propositions:

(1) The court erred in holding that the Cincinnati & Columbus Traction Company is not a lateral,

branch line of railroad, as to the lines of the appellees, within the meaning of section 1 of the act.

(2) The court erred in holding that the Commission did not have power to enter the orders in question:

(*a*) Requiring the switch connections, and

(*b*) Establishing through routes to part of the stations on the Traction Company's line.

BRIEF AND ARGUMENT.

I.

The purpose of the act and its application to the Traction Company.

The Traction Company is a common carrier engaged in the transportation of interstate commerce, its line extending from Norwood to Hillsboro, about 53 miles in the state of Ohio; it serves a territory and shippers who are making shipments to points in other states, and receiving shipments from points in other states. These shipments to and from this territory pass over the Traction Company's line to appellees' lines, and there, either at Norwood or at Hillsboro, are transferred by hand or truck, and proceed on their interstate journey. The expense of the transfers is either in the local freight rate or is a special charge paid by the shippers. Delay is occasioned by these primitive methods of transferring interstate freight, which works to the disadvantage of the shippers. To remedy these defects in interstate transportation facilities the Traction Company and the shippers requested that switch connections be made at each end of the traction line and that

through routes be established. The advantages to the shippers in having the switch connections are, (1) that transfers of less than carload lots can be made directly through the freight station by switching cars containing the shipments to the connecting carrier, without unreasonable delay, and without expense to the shipper; and (2) in case of carload lots, the transfer can be made by switching the car to the connecting line and its movement continued to point of destination. To secure the full benefit of these advantages, through billing over a through route is desirable. Where freight is billed through by a common carrier over connecting lines, all transfers, both as to less than carload lots and carload lots, are made by the carriers, unnecessary delays are prevented, and the territory served is put upon a reasonable equality with other producing and consuming territories.

The purpose of the act.—It is one of the purposes of the act to regulate commerce, as amended, to extend interstate facilities to every producing or consuming territory having "sufficient business to justify the construction and maintenance of" switching connections. No other purpose can be suggested for the provision in Section 1, as amended, providing that these connecting facilities shall be granted by the great trunk lines to the small lateral branch lines of railroad serving the smaller communities. To the big line of railroad these smaller streams are important, draining into its channel the traffic from a larger territory than is adequately served by its main line. When these lateral roads, however, are

of the electric type, a type just coming into extended use and competition with the steam roads, decided opposition is presented by the steam roads against the doing of anything that will put the electric roads upon an equality with the steam roads. This opposition has been pressed upon and met by the Commission in many ways. The Commission, however, has taken the view, obtained from the clear reading of the statute, that Congress recognized and intended to recognize the development of electric roads, especially for short lines into new territory; and while the statute provides that through routes and joint rates may not be established between steam railroads and a street electric passenger railway, it is clear that these interurban roads, carrying both freight and passengers, differing mainly from the steam roads in the motive power used, are now to be treated as a part of the great transportation system of the country. They are especially adapted, because of less expense in construction and operation, to serve the smaller rural communities not properly or adequately served by steam roads. But this service to the rural community will not be complete unless interstate shipments can be made over these lines in connection with the trunk lines carrying the great volume of interstate traffic.

The Traction Company in this case serves a community not large, but having a sufficient traffic to warrant the switch connection. Communities are not overlooked by the state because they are small. The only question involved, under the statute, upon

this point is whether there will be sufficient traffic to warrant the expenditure occasioned by a switch connection. This is a question of fact about which due investigation was made by the Commission, and its finding upon this fact is clear and conclusive. (Record, at the bottom of p. 11 and top of p. 12; *I. C. C.* v. *D., L. & W. R. R. Co.*, 220 U. S., 235.)

II.

Definition of lateral railroads.

The terms "lateral railroad" and "branch railroads" or "lateral branch railroads", occur frequently in special charters and general incorporation acts. In fact, until the incorporation of this phrase into the act to regulate commerce by Congress, it occurs in judicial opinions only in connection with condemnation cases, and the inquiry in these cases has been to ascertain whether the railroad company had the power under its charter, or a general act of incorporation, to build a lateral or branch railroad of a given kind or character. In all these cases the connection was made with the main line.

> It is true, as claimed by appellant, that whether a particular portion of a railway is a branch railroad or not does not depend upon its length or direction; but it must be connected with a main line, or constructed, in order to be such. (*Calling* v. *Griffin*, 56 Pa. State, 305; *1 Wood Railway Law*, section 189; *Biles* v. *Tacoma O. & G. H. R. R. Co.*, Supreme Court of Washington, Jan. 3, 1893, 32 Pacific Reporter, 211.)

And that:

> A lateral road is another name for a branch road; and a lateral or branch road is one which proceeds from some point on the main trunk between its termini, and is an appendage to and properly a part of the main road. *Newhall* v. *G. C. U. R. R. Co.*, 14 Ill., 273; *C. & E. I. R. R. Co.* v. *Wiltse*, 116 Ill., 449; *L. S. & M. S. Ry. Co.* v. *B. & O. & C. R. R. Co.*, 149 Ill., 272.

These cases differ from those arising under the act to regulate commerce in this, that the lateral lines referred to in the state cases were already connected with the main line and in that respect were "branches," while cases arising under the act to regulate commerce involve an order directing that a connection be made; after the connection is made they are in a sense branches or connecting lines. In all cases, however, the question of what constitutes a "lateral" road is the same.

The following cases are instructive in so far as they define the word "lateral" and show the disposition of the courts to give in each case force and effect to the spirit and purpose of the law.

The Supreme Court of Pennsylvania had before it a case involving the exercise of the power of eminent domain to construct an extension from the terminus of the Pittsburgh-Thomasville Railroad. The company was authorized "to survey, locate and construct one or more branches of railroad, extending from any point or points in any county through or in

which said main line passes, or in any adjoining county, with a view to the development of the territory within said limits, and furnishing an outlet for its production." The court said:

> Is the proposed extension a branch within the meaning of the act? We think it is. We can not agree that the definition of such a structure shall depend either upon its length or direction * * * The mistake is found in giving too narrow a definition to the word "branch." * * * The branching power given by the 9th section of the act of 1868 is sufficiently broad and comprehensive to authorize the construction of the road in question as a branch and there is no valid reason why it may not be constructed from the terminus as well as from any other point of the main line of the road.
>
> *McAboy* v. *Pittsburgh, etc., R. R. Co.*, 107 Pa. St., 558; American and English Ry. Cases, Vol. 20, p. 314.

In another case in the Supreme Court of Pennsylvania construing a statute which provided that, "Any company incorporated under this act shall have authority to construct such branches from its main line as it may deem necessary to increase its business, and accommodate the trade and travel of the public." Held:

> The main line, although less than four miles long, connects the Baltimore & Ohio and the Philadelphia & Reading systems, and thus becomes an important piece of road, over

> which a large amount of traffic must necessarily pass. * * *
>
> It is not necessary that we should discuss the difference between a branch and an extension. * * * We are clear that this is a branch, and that its character as such is in no sense affected by the incident that, to reach its objective point, it makes a detour that increases its length over that of the main line.
>
> Vollmer's appeal, 115 Pa. St., 166; 8 At. Rep., 223.

A case in the Supreme Court of West Virginia, brought to condemn a right-of-way to construct a branch or branches, was considered. The statute of West Virginia provided: "Any railroad company organized under this chapter may build and construct lateral and branch roads or tramways."

The proposed branch connected with another branch of the main line. The court said:

> Nothing is clearer under our statute than that the railway company may legally construct a branch of a branch, or, that two branches may have a common stem leading into the main line, provided neither exceed fifty miles in length from such main line.
>
> *Wheeling Bridge & T. Co.* v. *Camden C. Oil Co.*, 35 W. Va., 205; 13 S. E. Rep., 369.

The statute of New Jersey provided: "That whenever the railroads of any railroad corporations * * * intersect of cross each other, or shall approach each other within a distance of one mile, * * * it shall be lawful for either corporation to determine

upon constructing a branch railroad or railroads so as to effect such connection."

The Court of Errors and Appeals of New Jersey said:

> It is no objection to the legality of the proposed branch railroad that it will leave the main line on one side of the connection and return to it on the other. * * * The authority is to construct "a branch railroad or railroads so as to effect such connection" and a connecting loop is within the authority.
>
> *Attorney General* v. *Greenville & H. Ry. Co.*, 62 N. J. Eq., 768; 48 At. Rep., 568.

The Court of Appeals of Maryland considering a clause in the charter of the Baltimore & Ohio Railroad Company which authorized "lateral railroads, in any direction whatsoever, in connection with said railroad from the City of Baltimore to the Ohio River," said:

> The learned judge of the Circuit Court reached the conclusion that the proposed road was not a lateral railroad * * * and stated "any branch, therefore, from the main line that is not a feeder of the port of Baltimore is not a lateral railroad as contemplated in the charter. * * * I do not believe from the evidence that the proposed branch will be a feeder of the main line between Baltimore and the Ohio River."
>
> The testimony taken in this case shows that the proposed road will run through a territory without east and west railroad facilities, and that it will cross and connect with the Western

Maryland and Northern Central and the Maryland and Pennsylvania railroads, thereby interchanging traffic with all these roads, both giving and receiving it, and directly tending to develope the trade and transportation of the region it traverses. Yet, upon the theory adopted below, these connections can not be made under the charter. But that this was not the policy of the State in granting this charter appears to us to be conclusively shown by section 23 * * *.

But we have yet to inquire what is the true meaning of the term "lateral railroad". In most of them [charters] the same general power is given to construct lateral roads and in many the language used is very nearly the same. * * * In *Newhall* v. *Galena & Chicago Union R. R. Co.*, 14 Ill., 273, the court said: "A lateral road is one proceeding from some point on the main trunk between its termini. This is a road lateral to and proceeding from the main road. This is a simple fact. Ingenuity can not remove or disprove it."

B. & O. v. *Waters*, 105 Md., 39; 66 At. Rep., 685.

In the Supreme Court of Virginia a question arose as to the right to condemn land to connect the main line of the Richmond, F. & P. R. R. Co. with the Richmond & Petersburg Railroad Co., under a provision of the company's charter which provided, that the company "may make or cause to be made, branches or lateral railroads, in any direction whatsoever, in connection with the said railroad, not exceeding ten miles each in length."

The court said:

> What is a lateral or branch road? The word "lateral," according to Webster means "proceeding from the side; as, the lateral branches of a tree; lateral shoots;" and this I take it is the sense in which this word is to be understood when we speak of branch or lateral railroads. A lateral railroad is nothing more nor less than an offshoot from the main line or stem. * * *
>
> It seems to us, however, perfectly clear that we should hold in accordance with the unbroken current of decisions, as well as upon principle, that the mere fact that the contemplated road runs in the same general direction with the main track will not deprive it of the character of a branch or lateral road.
>
> * * * Upon what principle, then, can we hold that because of the mere circumstance that this branch road connects those two railroads that it ceases to be a branch or lateral road and is not authorized by the charter? We know of none. It may be that this right to make of a branch road a connecting link between two railroads may have been one of the unforeseen results of the grant of power, but as it does not change the terminus, serves as a feeder to the main stem, assists the company to develop the country through which it passes, and tends to promote the public convenience, both as to trade and travel, it can not be regarded as obnoxious to any of the objections that have been urged against it.
>
> *Blanton* v. *Richmond*, F. & P. R. R. Co., 86 Va., 618; 10 S. E. Rep., 925.

This court in a case involving the validity of certain bonds issued to aid in the construction of a branch road said:

> It [the railroad] was expressly authorized "To extend *branch* railroads into and through *any* counties that the directors may deem advisable." For the purpose of aiding in the construction by that company of a road from the junction of the main line with the Pacific Railroad, extending in a northeasterly direction to Booneville, through the county of Howard, the county court of that county, in its behalf and after a favorable vote by the people, made a subscription to the capital stock of the company and issued county bonds therefor. * * *
>
> The subscription was made and bonds issued, in pursuance of a provision in the company's charter which made it "lawful for the county court of any county in which any part of the railroad or *branches* may be, or any county adjacent thereto, to subscribe to the stock of said company * * * and for the stock subscribed in behalf of the county may issue the bonds of the county to raise the funds to pay the same and to take proper steps to protect the interest and credit of the county court;" * * * The railroad was constructed through Howard County as proposed and has been in operation ever since. * * *
>
> And now it is contended in behalf of the county, and no other question is presented for determination, that there was no legal authority for this subscription or issue of bonds.

> The argument in its behalf is that the main road of the company was established on a line south of the Pacific Railroad; that Howard County could not, by subscription, aid in the construction of the main line; and could not, by subscription, aid in the construction of a road from the junction of the main line northeasterly through that county, because such a road would not be a *branch* road but only an unauthorized *extension* of the *main* line.
>
> We are of opinion that the road constructed through Howard County was, within the meaning of the statute, a branch of the original or main line.
>
> *Howard County* v. *Bank*, 108 U. S., 314.

Observe how in each case above cited, the court rendering the decision lays emphasis upon the fact that the lateral road may connect at any point with the main line and becomes a lateral road by reason of its being (*a*) a feeder to the main line, and (*b*) that it tends to develop the trade and transportation of the region it traverses. In the Maryland case emphasis is laid upon the fact that it connects with other railroads and so furnishes to the territory which it traverses railroad connections, thereby promoting the public convenience both as to trade and travel.

The provisions of section 1 of the act to regulate commerce are clear and explicit:

> Any common carrier subject to the provisions of this act, upon application of any lateral, branch line of railroad, or of any

shipper tendering interstate traffic for transportation, *shall* construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, or where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; * * *

If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the commission, as provided in section 13 of this act, and the commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section 15 of this act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the commission, other than orders for the payment of money. (Concluding paragraph section 1, as amended.)

The clear purpose, and object in view, in this statute was the same as in the statutes construed in the cases above cited, namely, to develop trade and

commerce and accomodate the shippers in communities and territories not otherwise provided, or not adequately provided, with railroad facilities. No other purpose can be conceived for this legislation. This purpose then should dominate the construction to be given to the word "lateral" as used in the act.

In discussing the second ground of complaint, the commission, in its report, said:

> None of these towns is within less than approximately five miles, and two or three are ten miles or more by the country roads from any station on the defendant lines. To say that such places are already reasonably well served by either of the defendants is to announce the definite proposition that a wagon haul of from five to ten miles is not an improper burden to put upon an interstate shipper. But in such a view we are not ready to concur as a fixed rule, even when the country roads are so good as the roads in this territory are said to be. While we have little sympathy with, and will not ordinarily lend our aid to, an effort by one road to secure traffic that is reasonably tributary to another road by compelling the latter to join with it in through routes and rates, we shall not permit the theory as to what traffic is tributary to a road to be pushed to such an extreme as to impose an undue burden upon shippers. Confining our ruling to the special facts of the case and to the points last mentioned, we think the prayer for through routes should be granted.

This description of the communities in the territory traversed by the Traction Company, when read in the light of the facts in the cases above cited, shows satisfactorily that the Traction Company's line is performing important service for shippers in a territory not otherwise adequately provided with railroad facilities.

That these towns are small and that the Traction Company's line is a minor road, does not impress the case. The words of Mr. Justice Johnson in Gibbon *v.* Ogden (9 Wheaton 1, 196) are appropriate. He said:

> The great and paramount purpose [of the Constitution] was to unite this mass of wealth and power for the protection of the humblest individual; his rights, civil and political, his interests and prosperity, are the sole end; the rest are nothing but the means.

While the main purposes of the act to regulate commerce, as stated by this court in several opinions, is to prevent discrimination and favoritism between shippers and localities and to secure reasonable interstate rates, it is also the purpose of the act to extend interstate commerce to every community, by uniting and using all existing instrumentalities, and by raising all agencies to the highest efficiency.

This provision in section 1 of the act refers to minor or smaller lines of railroad; it has no reference to junctions between the great trunk lines. It is intended to secure, as the words clearly indicate, a current of commercial and industrial life to out-

lying communities which are served by these short and less important lines. The underlying question really is whether or not a community is already served by interstate commerce, or whether they are adequately served.

It is a mistake to regard these minor lines simply as small feeders to the main line as though they were created for the benefit of the larger railroad. The act to regulate commerce, while not antagonistic to railroads, and properly construed means their development and growth, is primarily for the purpose of building up the population and wealth of every community within the State. The main lines of transportation are the great arteries of commercial and industrial life, and send this life out through the "branches" to smaller communities. The word "lateral" therefore, as used in this statute, does not depend upon particular direction, or point of contact, or non-competition; but it does mean, properly defined and construed, a line which reaches a territory not adequately served by the main arteries. The time was in the history of the country when a wagon haul over country roads of five or ten miles to a railroad was not regarded as so very disadvantageous, but we have reached the point in competition and extension of trade when it is essential to the development of every community that it should have at its door the best possible means of interstate transportation; and it is to secure this that the statute seeks, in all proper cases, to compel the great lines of railroad to make connection with these lateral lines in

order that every part of the State may be served in the most advantageous manner by these great instrumentalities of interstate commerce.

This honorable Court in the case referred to, Interstate Commerce Commission *v.* D. L. & W. R. R. Co., (216 U. S., 521, 537) while not deciding the point in issue in this case, certainly recognized in the language used, the thought here expressed. Mr. Justice Holmes, speaking for the Court, said:

> There certainly is force in the contention that the words of the statute mean a railroad naturally tributary to the line of the common carrier ordered to make the connection, and dependent upon it for an outlet to the markets of the country, * * * but primarily, at least, to provide for shippers seeking an outlet either by a private road or a branch.

In this case it is also recognized that the purpose of the statute was primarily to serve the shippers; and under the statute as it then read this court held that only shippers could ask for such a connection. Since that decision was rendered Congress, recognizing the fact that the lateral road, in such a matter, represented the shippers, amended the act so as to provide that the complaint might be filed by the lateral road. It still remains true, however, that the primary purpose of the act is to serve the shippers in a given territory who are not otherwise properly served.

Taking this view and giving this broad construction to the statute, the commission had power to

order in the switch connections, provided each connection "is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same."

Whether the connection is practicable and safe, and whether there is sufficient business to warrant the expense, are questions of fact. Regarding the determination of these facts the act provides, "that the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor." These are not questions of law for the court to determine. As stated by this court in I. C. C. *v.* D. L. & W. R. R. Co. *supra*, "the statute creates a new right not existing outside of it"; and it provides a tribunal that is to determine the questions of fact.

This court has said, in several cases, that in the determination of these questions of fact arising under the act the conclusions of the Commission are final and not reviewable by the Commerce Court.

> *Baltimore & Ohio R. R.* v. *Pitcairn* (215 U. S. 481).
>
> *Int. Comm. Comm.* v. *D. L. & W. R. R.* (220 U. S. 235, 251).

Upon these questions of fact the Commission, after reviewing the evidence presented by the parties before it, and making a physical examination of the roads and their relation to each other for the purpose

of determining the practicability of the connection and the operation thereof, found as follows:

> A physical connection with the defendant, the Baltimore & Ohio Southwestern, at one time existed at Madeira and also at a point spoken of in the record as Hillsboro Junction. At the same time there was also a connection with the line of the Norfolk & Western at the latter point. * * * It is not to be doubted that it is reasonably practicable to restore these connections at those points or to put connections in elsewhere, or that when restored or put in elsewhere they can be operated with safety. Nor can it be doubted that there will be sufficient traffic to and from points on the line of the complainant reasonably to compensate the defendants for constructing, maintaining, and operating such switch connections with the complainant. (Record, pp. 11 and 22.)

The Commission further found:

> In conclusion we find that the complainant is entitled to a switch connection with the line of the defendant, the Baltimore & Ohio Southwestern Railroad Company, at Medeira, and to a switch connection at or near Hillsboro with the line of that defendant, as well as with the line of the Norfolk & Western Railway Company. (Record, pp. 15 and 16.)

And in the order it is provided:

> The expense of installing such connection to be borne by said complainant [the Traction Company].

The learned judge who wrote the opinion of the Commerce Court fell into a singular error by failing to discriminate between the two divisions of the case—the request for switch connections and the request for through routes, either one of which might have been the subject of a separate proceeding. The first complaint is under section 1, which provides for switch connections, the second is under section 15, which provides for through routes. There is no connection or interdependence between these two causes of action. Relief may be granted in either one without reference to the other; switch connections may be ordered in without any reference to the existence or nonexistence of through routes. Through routes may be established, and do exist, where there is no physical connection between the lines, the transfers being made by steamboats, lighters, trucks or other instrumentalities. Facts essential to relief in one case need not exist as to the other. The Commission discussed and determined each complaint separately as clearly appears in the report. Yet in the opinion of the Commerce Court (Record, p. 30) it is stated:

> In considering whether upon this showing the Cincinnati & Columbus Traction Company is a lateral branch railroad, within the meaning of the law, it is to be observed that, according to the test applied by the Commission, it is held to be such as to places and shippers along its line in the intermediate territory between Dodsonville and Boston, remote from and not sufficiently served by the trunk lines,

> but not as to those east or west of there, as the road approaches its termini, where this is not the case. But it is obvious that this is not and can not be the correct criterion. A road is or is not a lateral branch railroad, according to the relation which it bears to the line with which a switch connection is asked. And this relation is one of road to road, and not of shippers or territory. (Record, p. 30.)

The Commission applied no such test. It took up in its report, first, the application for a switch connection, considered the road as a whole, and reached its conclusions thereon independently and before considering the needs of particular stations for through routes. (Record, p. 12.) The Commission then proceeds to say: "The complainant *also demands*, as we understand the petition, through routes and through rates to and from all interstate points reached by the defendants' lines and their connections." It then considers the condition of the particular stations and discusses their needs for through routes; examines to see whether they have adequate through route connections over the main lines, *not with a view of determining whether the line of the Traction Company is a "lateral" line, but for the purpose of determining whether the Commission should order in through routes at these stations.* The Commerce Court evidently misconceived the nature and scope of the proceedings before the Commission and the purpose of the inquiry under each complaint.

The opinion of the Commerce Court proceeds upon another theory, which, if correct, would prevent connection with any lateral road. After calling attention to the fact that for some distance from each connection the stations or communities are severally served by the main line, the opinion says:

> For half this distance also one or other of the steam roads draws its local traffic from and serves substantially the same territory as the Traction Company. And so clearly are they within the limits named, c mpeting lines, that admittedly any attempt to consolidate the Traction Company with either of them would offend against the state if not the federal law. (Record, p. 30.)

This condition must exist as to every lateral line. If it operates to prevent the granting of the relief provided for in the statute, then the law becomes wholly ineffective and the construction destroys the statute. What is meant by the phrase "would offend against *the state* if not the federal law" is not apparent. This can not be the law.

Again, the Commerce Court says:

> It may be that some shippers along the line of the Traction Company's road are not so fully accommodated as they might be, as the case stands; and their needs are to be consulted to a certain extent without doubt. But this is not controlling, and their rights have necessarily to be worked out through the road for which in each instance a switch connection is sought, the character of which as a lateral

branch line is only incidentally affected thereby. (Record, p. 31.)

If the meaning of the last part of this quotation is understood, it must mean that the fact that a community is not adequately served with interstate transportation is not a very material matter in determining whether a road is a lateral road; that this question must be worked out mainly in reference to the larger roads whose local traffic may be slightly affected. This judicial attitude is very different from that taken by the State courts in the cases above cited. There the sole question seemed to be whether or not the communities and shippers were to be served, or better served, by the lateral road. One can not read the Federal act with an open mind without being impressed with the fact that Congress had in view primarily the interests of shippers, the growth of communities, the building up of the trade and commerce of the country. And if this be the purpose of the act, then the Commerce Court evidently erred in its conclusion above quoted.

Upon the authorities and for the reasons above cited, we respectfully submit that the Commerce Court erred in holding that the Traction Company was not a lateral, branch line railroad, within the meaning of section 1 of the act to regulate commerce.

As stated in the beginning of this brief, this is the only question decided by the Commerce Court, and upon which its decree is based. The power of the Commission to make the order in question is conceded, if the Traction Company's line is a lateral, branch

railroad. We therefore do not discuss other questions raised in the court below.

III.

The second order establishing through routes.

Section 15, as amended, among other things provides:

> The commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; * * *. The commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, * * *.
>
> And in establishing such through route the commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through

route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

As we have already noted this branch of the case is entirely separate and independent of the complaint asking for switch connections. The two complaints could have been brought in separate proceedings, or they could be, as they were, joined in one complaint. The orders, however, are separate orders under two independent provisions of the statute. It will be observed from a reading of the statute that the question whether the traction line is a lateral road has nothing whatever to do with the establishment of through routes and joint rates. These interstate routes and rates are not dependent upon the physical connection of the lines over which the through routes run. The transfer may be made through elevators, over docks, or by belt railroads, ferry boats, lighters, or drays. The decree of the Commerce Court, therefore, is clearly erroneous in suspending the order for through routes on the ground that the traction line is not, in the judgment of the Commerce Court, a lateral railroad.

Under this branch of the case, as stated by the Commission (Record, p. 12), there are only two conditions, namely, (a) the Commission may not require any railroad involuntarily to embrace in a through route substantially less than the entire length of its road between the termini of the proposed through route, and (b) it may not establish through routes

and joint rates between a steam railroad and a street electric passenger railway that does not transport freight and passengers. Neither of these limitations is violated by the order. The Commission in its report gives the reasons for establishing these through routes at particular stations on the traction line. Certainly the appellees can not object because the order does not establish through routes at every station upon the traction line. Eliminating the stations nearest the junction points was, as stated in the report, to protect the existing business of the main lines, these stations being adequately served by them. We do not discuss this question further, because the Commerce Court did not rest its decision upon this provision in the statute.

The exception made in favor of street electric railroads clearly shows that it was expected and intended that through routes and joint rates would be established between main-line roads and interurban electric roads. For, as Chief Justice Marshall so well reasoned with reference to powers granted to Congress by the Constitution of the United States, "Limitations of a power furnish a strong argument in favor of the existence of that power." *Gibbon* v. *Ogden*, supra. If the act to regulate commerce did not include electric railways doing freight and passenger business, there was no reason for excepting a particular class of electric railways from the power which Congress was then conferring upon the commission.

We respectfully submit that the Commerce Court erred in enjoining the order establishing through routes and joint rates.

Respectfully submitted.

CHARLES W. NEEDHAM,

Assistant Solicitor, Interstate Commerce Commission.

O

No. 648. **OCTOBER TERM, 1912.**

IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, CINCINNATI AND COLUMBUS TRACTION COMPANY and INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY AND NORFOLK AND WESTERN RAILWAY COMPANY, Appellees.

Appeal from the United States Commerce Court—Transcript No. 23209.

BRIEF OF ARGUMENT FOR BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY AND NORFOLK AND WESTERN RAILWAY COMPANY, APPELLEES.

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OCTOBER, 1912.

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IN THE

Supreme Court of the United States.

The United States of America, Cincinnati and Columbus Traction Company and Interstate Commerce Commission, Appellants,	October Term, 1912.
vs.	No. 648.
Baltimore and Ohio Southwestern Railroad Company and Norfolk and Western Railway Company, Appellees.	Appeal from the United States Commerce Court—Transcript No. 23209.

BRIEF OF ARGUMENT FOR BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY AND NORFOLK AND WESTERN RAILWAY COMPANY, APPELLEES.

STATEMENT OF THE CASE.

In some respects the statements of the case in the briefs filed for the Commission and for the United States in this case would seem insufficient to give this court an accurate picture of the case. To controvert the statements of the case appearing in those briefs we herewith submit our own statement of the case as permitted by sub-section 3 of Rule 21.

Upon complaint of the Cincinnati and Columbus Traction Company and, after hearing, the Interstate Commerce Commission made a report dated March 14th, 1911, and thereafter entered an order dated December 13th, 1911, which order will be found recited (Transcript of Record, page 41), in the petition of the steam railroad companies filed in the Commerce Court.

By this order the Baltimore and Ohio Southwestern Railroad Company was required to construct and operate during a period of not less than two years, switch connections for the transfer of interstate traffic at Madeira and Hillsboro, Ohio, the expense of such connections to be borne by the Traction Company; and a similar direction was addressed to the Norfolk and Western Railway Company for a switch connection at Hillsboro, Ohio. The order further directed both defendants to establish and put in force for a period of not less than two years through routes to and from interstate points to and from all points on the Traction Company's line between and including Boston and Dodsonville, in the State of Ohio, in order that shippers at and between those points might have access to and from the interstate points by interchange of cars under through billing and through charges based upon the rates of the respective carriers to and from the junction points established by the order.

The steam roads, the Baltimore and Ohio Southwestern Railroad Company and the Norfolk and Western Railway Railroad Company, thereupon filed a petition in the United States Commerce Court (No. 60) on January 22nd, 1912, praying a preliminary injunction against the order of the Commission suspending the operation of the order and other further full relief. The case was heard by the United States Commerce Court on the petition for injunction of the steam roads, and the answers thereto of the Cincinnati & Columbus Traction Company and the Interstate Commerce Commission, and the motion of the United States to dismiss said petition. After this hearing and after the entry by the Commerce Court on

February 14th, 1912, of an order granting a preliminary injunction and denying the motion to dismiss, the Traction Company and the Interstate Commerce Commission withdrew their answers on the 17th February 1912, leave having been granted them to do so, and joined in and adopted the motion of the United States to dismiss the petition. The final decree entered April 19th, 1912, was made on the said petition, considered under the Rules of the Commerce Court as upon demurrer, that court being of opinion that upon the facts which were not in dispute as to this point the traction line was not a lateral, branch railroad as to the steam lines.

An abstract of the petition filed by the steam roads in the Commerce Court follows:

The first three paragraphs state the nature and business of the two steam railroads to be corporations to operate lines of railway in interstate commerce and describe the systems of railroad operated by said corporations in general and in particular those parts of the lines of the two companies which operate from Cincinnati or Norwood, a suburb of Cincinnati, to Hillsboro, Ohio.

The third paragraph avers that the petitioners have filed tariffs as provided by law with the Interstate Commerce Commission, prescribing rates for the transaction of their business of interstate commerce, and have been and are subject to the laws, rules and regulations prescribed by Congress or the Interstate Commerce Commission with respect to the operation and maintenance of their roads.

Three additional paragraphs are then devoted (Transcript, page 2) to a description of the corporation known as the Cincinnati and Columbus Traction Company and of the lines and business done by that company. Briefly stated the description is of a line of railway from Norwood, in Hamilton County, Ohio, through and across the counties of Hamilton, Clermont and Brown to and into the city of Hillsboro, in Highland County, without

crossing or intersecting or connecting with the line of either of the railroads of the petitioning steam roads and which "serves the same persons, municipalities, and communities that are served by these petitioners."

The next paragraph (Transcript, foot of page 2) sets forth that on November 12th, 1908, the Traction Company served written notice on the petitioners, demanding that they establish track connections and joint rates for the interchange of interstate traffic; and the next paragraph (Transcript, top of page 3) avers that the Traction Company did not make any other or further demand for track connections.

The next three paragraphs (Transcript, pages 3-4) recite the filing of complaint of the Traction Company with the Interstate Commerce Commission; the hearing thereon and the order, the terms of which have already been hereinbefore set forth.

Thereupon the petitioners the steam railroads, in their petition aver (Transcript, page 5) that because of the facts theretofore and thereafter alleged the order of the Commission was invalid and should be enjoined and wholly set aside and annulled for these reasons: (Transcript, pp. 5-8):

> 1. Because the Traction Company had no right or authority under the law of the State of Ohio to have its tracks connected with the steam railroads, being an interurban street railroad as distinguished from a steam railroad.
>
> 2. Because the Traction Company is not and never has been "such a lateral branch line of railroad as is contemplated by and described in the provision of the Act to Regulate Commerce relative to such track connections as were prayed for in the said proceeding and are prescribed by said order, and the said order is an attempted exercise by the Commission of powers which it does not possess."
>
> 3. Because at the time the proceeding was instituted there was no statutory provision authorizing the Com-

mission to entertain such a proceeding at the instance of the lateral, branch line of railroad.

4. Because the order is beyond the constitutional power of the Commission in that the order requires the petitioners to exchange equipment without providing for compensation for the loss or use of such equipment.

5. Because the uncontradicted evidence before the Commission was to the effect that the curves on the line of the Traction Company in Madisonville prohibit the operation of a freight car or cars without disregard of the safety appliance law and because at Milford the bridge clearance would render dangerous the operation of ordinary freight cars on the Traction Company's line.

6. Because the physical condition of the Traction Company's roadbed would render unsafe the operation of freight cars such as those used by petitioners on the line of the Traction Company; and in this connection the petition points out that petitioners, as initial carriers issuing bills of lading over the through routes, sought to be established by the order of the Commission, will be liable under the Carmack Amendment to Section 20 of the Act to Regulate Commerce for any loss, damage or injury to shipments caused by the Traction Company.

7. Because the accounts of the Traction Company show a deficit and earnings insufficient to pay operating expenses so that the steam roads should not be made to enter into traffic arrangements with a railway corporation not in a position to save harmless petitioners from the consequences of the responsibilities which the petitioners would inevitably be called upon to assume by complying with the order.

8. Because the Commission, as appears from its report, written by Commissioner Harlan and exhibited with the petition (Transcript, pages 8-16 and 20 I. C. C. R., 480), states that its conclusions as to the safety of the traction line for the use thereon of

> the steam roads' freight cars, etc., are based "more largely upon our own investigations" than upon testimony of witnesses who testified in the said proceeding.

With the petition as exhibits were a map showing the *locus* of the traction line and the two steam lines and of the stations, as well as some general features of the country, and a copy of the report of the Commission. On the page fronting this we have reproduced the essential features of this map in reduced size for convenient reference.

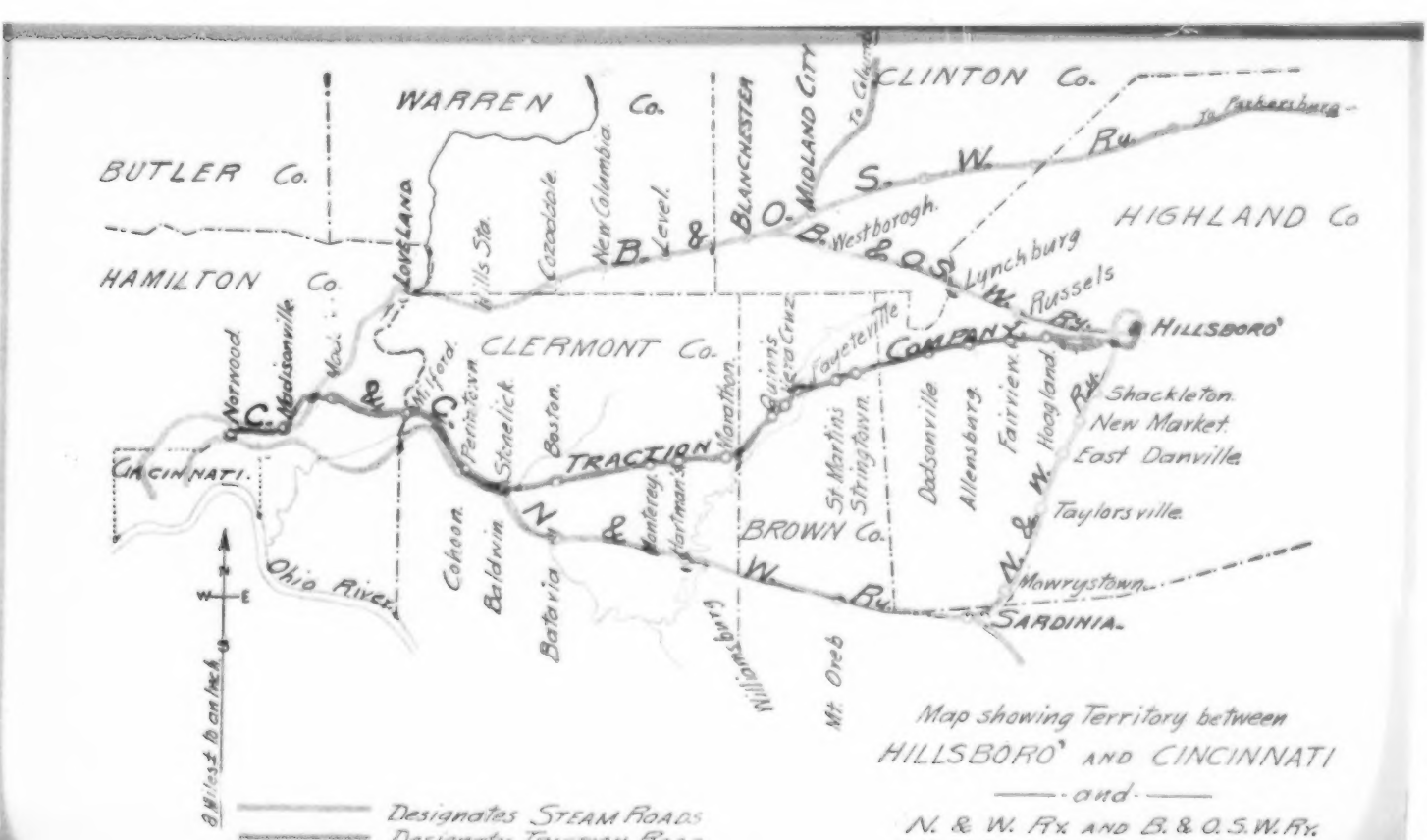
The statement is made in the brief for the United States, page 2-3, that the Traction Company "did have actual switch connections with both" of the lines of the appellees and that "these switch connections were removed (Transcript, page 111: "but in the year 1908 the Traction Company served upon both appellees a written request for their re-establishment." The mistaken impression is here given that what is sought in the present proceeding previously existed. The following sentence from the report of Commissioner Harlan (Transcript, page 111) shows the nature of the connections alluded to:

> "They were put in when the line of the complainant was under construction and were removed after its completion, apparently in accordance with a previous understanding to that effect."

These connections were removed in 1905, three years before the Traction Company made the request out of which the present proceedings arise.

On February 6th, 1912 (Transcript, pages 20-21), the Attorney General filed a motion of the United States to dismiss the petition.

On February 7th, 1912, the cause came on for further hearing on motion for preliminary injunction and the arguments of counsel were concluded; and on February 10th, 1912 (Transcript, page 22), the Court directed that



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put in tracks to connect with the Traction Company is that portion of Section 1 of the Act to Regulate Commerce as last amended by the Act of Congress of 18 June, 1910, 36 U. S. Statutes at Large, part 1, paragraph 3 on page 547, which declares that any common carrier subject to the provisions of the Act

> "upon application of any lateral, branch line of railroad, * * * shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper."

Then follows a provision that if the carrier fail to install and operate any such switch or connection on application therefor in writing by any shipper or the owner of any such lateral, branch line of railroad, then complaint may be made to the Commission which "shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order" directing the carrier to comply with the provisions of the Section.

This is the only power which the Interstate Commerce Commission has to order a switch connection. The general power to order switch connections between railroads rests with and is exercised by the States as in Wisconsin M. & P. R. Co. *vs.* Jacobson, 179 U. S. 287, and Oregon R. R. and Navigation Co *vs.* Fairchild *et al.*, 224 U. S. 510.

The Commission made a finding "that the complainant is entitled to a switch connection" (Report of Commis

sioner Harlan, Transcript, page 15) under the last paragraph of Section 1 of the Act to Regulate Commerce as amended by the Act of 18 June, 1910, which provides that in a proper case a carrier subject to the Act

> "shall construct, maintain and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad;"

and made another finding based on the legality of the previous finding

> "that the record justifies an order requiring the defendants to join with the complainant in establishing through routes,"

(Transcript, page 16), which last mentioned finding was under the third paragraph of Section 15 of the Act to Regulate Commerce as last amended 29 June, 1906. The proceeding in this case combined the exercise of these two powers. Unless the Traction Company has established that its line is a lateral, branch line of railroad under Section 1 and has thus established the right to a switch connection, then the Commission has no power to order through routes under Section 15. Section 15 does not authorize an order directing the construction of a connecting track.

But the Assistant Solicitor for the Interstate Commerce Commission contends that the establishment of "these interstate routes and rates" is "not dependent upon the physical connection of the lines over which the through routes run:" (page 32 of the brief for the Interstate Commerce Commission). He adds: "The transfer may be made through elevators, over docks, or by belt railroads, ferry boats, lighters or *drays*." (The italics are ours.) Stated as applying to the case at bar, the contention is that although there is no physical connection between the lines of the steam roads on the one hand and of the Traction Company

on the other, yet that the Fifteenth section of the Act to Regulate Commerce vests in the Commission the power to establish through routes and joint rates. The Fifteenth Section of the Act to Regulate Commerce as amended by the Act of 18 June, 1910, provides that:

> "The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or join classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line."

In the same section we find other provisions showing that only lines of connecting carriers were meant by Congress in vesting in the Commission the power to establish through routes and joint rates. For instance, we find the duty cast upon the primary carrier "to transfer said property over its own line or lines and deliver the same to a connecting line or lines according to such through route:" and the further "duty of each of said connecting carriers to receive said property" etc. Congress limited the grant to power to establish through routes and joint rates as to "connecting carriers:" "a connecting line or lines:" "each of said connecting carriers."

Only *connecting carriers* are affected. What is a connecting carrier? To "connect" is to join, unite, bind or fasten together.

In Atchison Railroad *vs.* Denver Railroad, 110 U. S. 667, this Court considered a constitutional provision in Colorado that every railroad company shall have the right with its road to "connect with * * * any other railroad," and held that only a mechanical union of the tracks of the

two roads so as to admit of the convenient passage of cars from the one to the other was intended. Mr. Chief Justice Waite said:

> "This clearly applies to the road as a physical structure, not to the corporation or its business."

Unless all the carriers whose lines are to constitute the through route are subject to the Act and hence to the jurisdiction of the Commission, the Commission has no power to establish a through route and rate. Draymen hauling between the stations of the steam carriers and the Traction Company in Hillsboro and Cincinnati would not be subject to the Act: *In re* Parmalee Company 12 I. C. C. R. 39.

The order of the Commission in the case at bar shows that the Commission recognized this limitation of its power. The report of the Commission (Transcript, page 16) was limited to an order directing the carriers to establish through rates on combination of existing tariffs and did not contemplate or provide for the cost of transfer by drayage. No draymen was a party to the proceedings. The order for a through route entered by the Commission was properly made by the Commission dependent upon the previous finding of the Commission on the other branch of the case that the Traction Line was a lateral branch line of railroad as to the two steam lines. The finding of the Commission in this case is inconsistent with the argument now for the first time advanced on behalf of the Commission that there is power to unite in a through route two carriers which are not physically united but must employ a drayman or local transfer agency not subject to the Act to Regulate Commerce to haul shipments and passengers from the terminal of one carrier to the terminal of the other.

We repeat that unless the Traction Company has established that its line is a lateral branch line of railroad as to the two steam roads there is no power vested in the Interstate Commerce Commission to establish through routes and joint rates between carriers who are not physically connected.

To recapitulate: unless the finding of the Commission that the Traction Line was a lateral, branch line of railroad is correct the second part of the order establishing through routes and rates is necessarily void for lack of power in the Commission to unite any but connecting carriers—that is to say, carriers which are in some way already connected.

Counsel for the United States at page 6 of their brief misapprehend the decision of the Commerce Court in averring that it was based upon a consideration of the angle at which the line of the Traction Company approaches the lines of the steam roads or that it involved a concession that the Traction Company is a competitor of the steam roads at or near its termini.

The question on which the Commerce Court decided the case, is whether on the facts set forth in the petition and exhibits the line of the Traction Company was a lateral, branch line of railroad as to the two steam lines. The meat of the Commerce Court's decision is to be found in the following quotation from its opinion (page 31):

> "The point here is that the Traction Company's road instead of being dependent or tributary is in its own peculiar sphere and as to both steam roads an equal, independent and competing line."

Upon this question the decision of this court announced by Mr. Justice Holmes in Interstate Commerce Commission *vs.* Delaware, Lackawanna & Western R. R. Co., 216 U. S. 531, strongly intimates a definition of "lateral, branch line of railroad," which would exclude such a line as that of the Traction Company. In that case Mr. Justice Holmes pointed out that "the object was not to give a roving commission to every road that might see fit to make a descent upon a main line," and also pointed out that there is force in the contention that the words of the statute "mean a railroad naturally tributary to the line of the common carrier ordered to make the connection, and dependent upon it for an outlet to the markets of the country." A competing interurban traction line is

neither "naturally tributary" nor "dependent upon" the steam lines "for an outlet to the markets" &c. The Commerce Court was largely influenced by the opinion in the Lackawanna case.

One of the counsel for the United States quoted from the opinion of Mr. Justice Holmes in the case last cited (216 U. S. at page 537):

> "On the other hand, it would be going far to lay down the universal proposition that a feeder might not be a lateral branch road of one line at one end, and of another at the other."

and urged that the Traction Company in the case at bar fell within the hypothetical case suggested by Mr. Justice Holmes, the argument being that the two steam roads in the case at bar "served different regions." But such an argument from the language of Mr. Justice Holmes overlooks the essential word which he has used to describe the lateral or branch line. He speaks of the lateral or branch line he has in mind as "a feeder." A competing railroad is not a feeder. As was said by Senator Spooner in defining the intention of the amendment:

> Mr. Spooner. * * * "It is not a competitor; only a feeder.
>
> Mr. Hale. It is a feeder?
>
> Mr. Spooner. That is all."
>
> (40 Congressional Record, page 7927.)

The Court will observe also that the argument for the Government on this point is that the serving of "different regions" by the two steam roads is decisive that the traction line is a lateral, branch line of one at one end and of the other at the other end. By this method the classification of a lateral, branch line of railroad would depend not on the tributary quality, the lack of market, the dependence, etc., of the applying railroad, but would depend upon qualities of the trunk lines to which the application is made. If anything is certain in this statute, it seems to be that the

phrase, "any lateral, branch line of railroad" occurring in the law must be defined by the character, location, opportunity to reach markets with its products, etc., of the applying company or carrier.

The Lackawanna case was decided upon a state of facts arising prior to the amendment by Act of Congress of 18 June, 1910, but the amendment only went to the character of the parties who might make application for relief and did not touch or affect the part of the statute which defined "lateral, branch line of railroad," and limited relief to the single case of a lateral, branch line of railroad.

Let us now refer to the facts with regard to the character of the traction line in the relation of that line to the lines of the two steam railroads. The map, which appears, facing page 6, shows the traction line in red and the two steam lines in green. Just here we may quote the facts as found by the Commission and appearing in the report of the Commission (Harlan, Commissioner, 20 I. C. C. Rep. 486-494), which report was Exhibit No. 2 with the petition of the petitioners in the Commerce Court:—

> "For a distance of about six miles eastwardly from Norwood the line of the complainant not only parallels the line of the Baltimore & Ohio Southwestern but practically adjoins the right of way of that defendant. A few miles farther to the east it approaches and at Perintown practically adjoins the right of way of the Norfolk & Western and parallels that road for a few miles to Stonelick, at which point it is only about a mile distant from the Norfolk & Western. Its station at Norwood also immediately adjoins the stations of the defendants, the Baltimore & Ohio Southwestern and the Cincinnati, Lebanon & Northern Railway Company. For a distance of some four or five miles out of Hillsboro, its eastern terminus, the complainant's

line again parallels the tracks of the Baltimore & Ohio Southwestern, the rights of way of the two lines being immediately adjoining."

The traction line is an independent, interurban traction line, operating between the same termini as the steam lines and lying physically between those two lines, and at no point is more distant than ten or twelve miles from one or the other of the steam lines. As to the East and West ends of the traction line that line is a local competitor at the same stations of one or other of the steam lines, as well as a through competitor between the same termini of both. The Traction Company has its own stations, local and terminal. The Report of Commissioner Harlan speaks of "its station at Norwood," (Transcript, page 12); and of "Hillsboro, its eastern terminus," (Transcript, page 12).

Can the line of the Traction Company by any reasonable definition of the phrase, "lateral, branch line of railroad," be deemed under these conceded facts to be a lateral branch line of railroad as to the two steam roads? This is a question of law which the Commerce Court in its opinion (Transcript of Record pages 25-31, inclusive), has answered in the negative, which decision is now before this Court for review.

A review of the legislative history of the "lateral, branch line" phrase in the act will demonstrate the intention of Congress. When the Conference Report came up in the Senate (page 7927 of the Congressional Record, Vol. 40) Senator Spooner explained the introduction by the Conference Committee of the words "any lateral, branch line of railroad" into the statute as enlarging "the class so as to take in the lateral branch lines of railroads with the shipper," and pointed out that the branch provision "deals with precisely the same subject," showing that a feeder railroad or a shipping railroad was intended by the phrase. Later in the same debate Senator Spooner explained the lateral railroad to mean a railroad "built from the side. It may be 20 miles; it may be 10 miles; it may

be 50 miles; it may be 100 miles;" as a railroad that "brings the trunk line business;" as a railroad that "is not a competitor; only a feeder;" and he then concluded with this explanation:—

> "MR. SPOONER.—A firm, a coal company, or a group of independent coal-mining companies are unable to get cars, they are unable to obtain switches, they are unable to connect with the line upon which they are dependent to get to market, and they may organize a little company and build 10 miles or 20 miles of railroad. Of course, it is a common carrier; it has to be. Constructing that road to a connection with the long line engaged in interstate commerce, there is every reason in the world why, upon fair terms, it should be permitted to connect with that railroad, so as to be able to secure an interchange of traffic and cars on fair terms."
>
> (Vol. 40 Cong. Record, page 7927.)

These explanations of the Conference Report in introducing this provision as to lateral, branch lines of railroad into the statute exclude the idea that an independent, competing line with its own termini and stations can ever be a lateral branch line as to its competitors.

There must be some closer relation between the branch road and the main line than ordinarily exists between two independent railroads which approach each other. The relation must include something more than the mere proximity of the terminus of one road to the line of the other. Otherwise one trunk line might well be held to be a lateral branch road with respect to another trunk line. We would have no sound distinction between a lateral branch railroad and other railroads referred to generally in the act. This would be contrary to the express language in the act which shows that such a distinction was contemplated by Congress.

What other conceivable definition of a lateral, branch railroad, as the term is used in the clause, can be adopted

than that it is a line of railroad, naturally tributary to the line of the "common carrier" and entirely dependent upon it for an outlet to the markets of the country?

In no other sense can one road be deemed a branch or part of another road. We thus give the ordinary meaning to the words "branch" and "lateral;" we draw an intelligible distinction between a lateral, branch line of railroad and other railroads referred to generally in the act, and we give effect to the object which Congress desired to accomplish by this clause (as we shall now endeavor to show more fully), namely, to give shippers located upon isolated branch roads, having no connections, an outlet to the markets of the country.

The purpose of the provision under discussion in Section 1 is to require a connection to be made for the benefit of roads such as lumber railroads, mining railroads, private railroads of one sort or another which otherwise would be unable to reach any market. Such railroads are lateral or branch railroads in the sense of being dependent; that is to say, dependent for an outlet to market upon the railroad or system of railroads with which the connection is sought.

Not dependence of management or ownership, not mere size, but dependence upon the railroad with which the connection is sought in the sense of having that railroad as the only outlet to the markets of the country is one controlling factor. Unless the railroad seeking connection is dependent upon the other railroad in the sense of not being in any other way able to obtain an outlet to the markets of the country it is not a lateral or branch railroad within the meaning of this statute.

In the brief of the Assistant Solicitor for the Interstate Commerce Commission are cited various decisions defining "lateral" or "branch" lines. We do not deny that these decisions are correct. But we assert that they support rather than overthrow the decision of the Commerce Court, that an interurban competing traction line operating between the same termini as the two steam rail-

roads and lying between them physically, is not a lateral, branch line of railroad. One example is worthy of note: At page 17 the Assistant Solicitor cites Blanton *vs.* R., F. & P. R. Co., 86 Va. 618; 10 S. E. 925, to the effect that a road which "serves as a feeder to the main stem" is a branch. A competing line is not a feeder. As was said by Senator Spooner, the lateral, branch line of railroad which Congress had in mind "is not a competitor; only a feeder:" (40 Con. R., page 7927, *supra.*)

And counsel for the United States (page 9 of their brief) quote Mr. Justice Holmes in the Lackawanna case *supra* that the object of the Act was "primarily at least to provide for shippers seeking an outlet," and erroneously translate "outlet" to mean "reasonable access to the main arteries of interstate commerce." But if this suggestion be considered of any importance, the answer is that upon the conceded facts shippers here had an outlet through the Traction Company, which is admitted by the demurrer to be a parallel, competing, self-sustaining line with its own stations, terminals, etc.

The line of the Traction Company in the case at bar is not dependent upon either of the petitioning steam roads "for an outlet to the markets of the country," and it is not possible that such a road or rather the part of the road selected by the Commission and covered by its through route order is within the statutory description. As was said by the Commerce Court in the case at bar (Transcript, page 30 and 195 Fed. Rep. at page 967):

> "Looking to the purpose of the law, a road is a lateral branch road when it is tributary to and dependent on another for an outlet; that is to say, where it is essentially a feeder, contributing traffic and capable of interchanging it therewith. It is not such where it is in effect an independent and competing line. Nor is this any less the case because it may not compete as to a portion of the territory involved. It is the general effect which decides, and that is not in doubt here. All three roads in the present instance have the same gen-

> eral east and west direction, and, so far as concerns Hillsboro on the east and Cincinnati or Norwood on the west, run between the same points. For half this distance also one or other of the steam roads draws its local traffic from and serves substantially the same territory as the traction company. And so clearly are they, within the limits named, competing lines, that admittedly any attempt to consolidate the traction company with either of them, would offend against the State if not the Federal law."

(b) A finding that a particular railroad is a "lateral, branch line of railroad," entails a duty upon the trunk line to "furnish cars for the movement of" traffic. A construction of the phrase which would include a competing line would involve the unconstitutional result that the steam roads would be obliged to furnish cars to the competing Traction Company and this without providing for adequate protection for return of the cars or compensation.

The paragraph of Section 1 of the Act to Regulate Commerce as amended 18 June, 1910, upon which the order rests, declares that any common carrier "upon application of any lateral, branch line of railroad" shall construct, maintain and operate a switch connection

> "with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; *and shall furnish cars for the movement of such traffic* to the best of its ability without discrimination in favor of or against any such shipper."

The discussion (brief U. S. pages 24, 25, etc.) as to the terms of the Commission's order with regard to car interchange is immaterial as the Statute regulates the matter and requires the carrier to furnish cars for traffic originating on the Traction Company's line.

In L. & N. R. R. Co. *vs.* Central Stock Yards Co., 212 U. S. 132, a provision in the constitution of Kentucky that a carrier must deliver its cars to connecting carriers, which provision did not provide for adequate protection for their return or compensation, was held to be a taking of property without due process of law forbidden by the 14th Amendment. In the opinion of the Court it was declared that any regulation of the interchange of cars "could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use." *Id.* 144.

The Norfolk & Western Railway Company and the Baltimore & Ohio Southwestern Railroad Company would under the order of the Commission, have been required by the statute and irrespective of the provisions of the order to "furnish cars for the movement of such traffic" (originating on the traction line or destined to the designated points on that line) "to the best of its ability," etc.

The truth is that the provision with regard to furnishing cars in this statute was enacted by Congress with reference only to those wholly dependent feeder lines which Congress had in mind in using the phrase "any lateral, branch line of railroad," and the provision as to car supply of such lines would be inappropriate and unconstitutional under the decisions of this Court if applied, as was done by the Commission's order in the case at bar, to a competing line.

POINT 2.

(Assignments of Errors II and VIII—Transcript of Record, Pages 35-36.)

The Commerce Court had jurisdiction to grant the injunction and to determine the question of law presented on the face of pleadings.

Since this case was decided below the jurisdiction of the Commerce Court has been authoritatively defined. That Court is endowed with the same jurisdiction and power existing at the time of the passage of the Act creating the Court in the Federal Circuit Courts: The Proctor & Gamble Company *vs.* United States (June 7, 1912), 225 U. S., 282. In another case decided three days later of United States *vs.* Baltimore & Ohio Railroad Company (June 10, 1912), 225 U. S., 306, the Chief Justice delivering the opinion pointed out that the Commerce Court was endowed, in considering whether an affirmative order of the Commission should be enforced or set aside, with "the jurisdiction and power existing at the time the Act was passed in the Circuit Court of the United States."

A decree of the Commerce Court granting a preliminary injunction to restrain an affirmative order of the Interstate Commerce Commission was affirmed.

We are not without a recent thorough explanation of the jurisdictional power (now vested in the Commerce Court) which was formerly in the Circuit Courts of the United States. In Interstate Commerce Commission *vs.* Union Pacific R. Co., 222 U. S. 541 (1912), Mr. Justice Lamar said, at page 547:

> "There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of

law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibitions against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

Counsel for the United States (at page 10 of their brief) assert that the finding of the Commission requiring a switch connection "is one of the very things in respect to which the Commission is especially trained and expert and intended to be final," thus contending that the question is one of fact. In this connection it must be remembered that the other side is here as upon demurrer and that all the matters well pleaded in the petition are admitted to be true including the facts which show the Traction line to be a parallel, competing and self-sustaining line with its own stations, terminals, etc. The Government and the Commission succeeded in excluding in the Commerce Court the evidence before the Commission; and it is not open to counsel for the Government now to contend, as on demurrer, that the facts are other than as stated in the petition. The finding of the Commission that the Traction line was entitled to switch connections and in that sense a lateral branch line was, as stated by Mr. Justice Lamar in the case last cited, "based upon a mistake of law."

The same misapprehension of the state of the record is shown in the brief of the Interstate Commission and also in the brief for the United States. Constantly our opponents appear to forget that the case is before this Court on bill and demurrer and that facts not appearing in the petition or bill may not now be considered.

Point 3.

(Some General Suggestions.)

The decree perpetuating the injunction must on demurrer to the petition be affirmed if on any ground the decree was warranted. Other grounds upon which the decree must be affirmed exist than that on which the Commerce Court expressly rested its decision, namely:

(a) The Commission did not as required by Section 1 of the Act "determine * * * reasonable compensation" for the steam lines.

(b) The Commission had no jurisdiction because no shipper made application in writing:

(c) The Commission or Congress cannot require an interchange of cars with a competing line and without providing for their return and compensation for their use.

(d) The order of the Commission is invalid because the foundation of the order was the independent investigation of the Commission not contemplated or permitted by the Commerce Act:

The brief of the Assistant Solicitor for the Interstate Commerce Commission contends (page 7 and page 33) that questions raised but not decided in the Commerce Court need not be discussed because "the only issue upon which the opinion and decree of the Commerce Court was based" was the question of law that upon the conceded facts the Traction Line was not a lateral, branch line of railroad. This position is incorrect. If on *any* ground the decree can be supported, then that decree will be affirmed. Accordingly, even if this Court should be of opinion that the definition of "Lateral, branch line of railroad" should include such a line as that of the Traction Company in the case at bar, still this Court will

be under the necessity of proceeding to consider and decide the other points of law which arise upon this record: and will affirm the decree if upon any of those points the decree was justified. Thus we are under the necessity of proceeding to a discussion of other points each of which, as we think, would alone justify affirmance.

(a) The Commission did not as required by Section 1 of the Act "determine * * * reasonable compensation" for the steam lines.

(*a*) The final sentence of the last paragraph of Section 10 of the Act to Regulate Commerce as amended 18 June, 1910, provides that after application in writing by the owner of a lateral, branch line of railroad, such owner may make complaint to the Commission and "the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor."

The order in the case at bar (set forth in full in the petition, Transcript, page 4) directed the Norfolk & Western to construct and for a period of not less than two years to maintain and operate a switch connection near Hillsboro, and directed the Baltimore & Ohio Southwestern to construct and thereafter to maintain and operate for not less than two years certain switch connections. In each instance the order provided "that the expense of installing such connection to be borne by said complainant," but the order did not require the complainant to install the connection. The steam lines had laid upon them the burden of installing, maintaining and operating the connection with a right of action over against the Traction Company for the expense of installation only.

Is a right of action that "reasonable compensation" which the Commission is by the Statute directed to determine? Is the taking of property and the substitution of a mere cause of action due process of law?

In Attorney General *vs.* Boston & Albany R. R. Co., 160 Mass. 62, 1893, the Massachusetts Statute requiring railroad companies to issue interchangeable mileage books was held unconstitutional, and Field, C. J., said at page 90:

> "The statute authorizing the taking must contain some provision for obtaining adequate indemnity. It is not enough to leave the owner to his action at law for damages."

As said in Bloodgood *vs.* Mohawk & Hutchinson R. R. Co., 18 Wendell, 9, 35:

> "The making of this compensation must be as absolutely certain, as that the property is taken. It must not be dependent on any hazard, casualty or contingency whatever."

The Commission decided that the steam Railroad Companies ought not to bear the expense of the track connections. Congress did not intend they should be required to bear that expense and take the risk of being reimbursed at the end of a lawsuit by a corporation whose financial responsibility was, to say the least, doubtful. Not only is the law plain in itself but any other construction would make it unconstitutional.

Waterbury vs. Platt Bros & Co., 76 Conn., 435, 440, and citations;

City of St. Louis *vs.* Hill, 116 Missouri, 527, 535, 536; cited by Justice Holmes in 212 United States at 144;

Commissioners of Beaufort County *vs.* Bonner, 153 North Carolina, 66, 68, 72, citing other North Carolina cases;

Connecticut River R. Co. *vs.* Commissioners of Franklin County, 127 Mass. 50, 52 to 57;

And see Louisville & Nashville R. R. Co. *vs.* Stock Yards Company, 212 United States, 132, 144, and cases cited.

The order conceding, as it necessarily does, that the expense of the track connections should not be borne by the Railroad Companies and making no provision whatever to protect them, but leaving them to take their chances in this respect brings the case directly within the ruling of this court in Missouri Pacific Ry. Co. *vs.* Nebraska, 217 United States, 196.

(b) The Commission had no jurisdiction because no shipper made application in writing.

(*b*) It is alleged in the petition and also appears from the report that the proceeding before the Commission was brought by the Traction Company; that subsequently two shippers addressed letters to the Traction Company authorizing the use of their names as co-complainants; that thereupon the Traction Company requested the Commission to make such persons co-complainants, and that no shipper ever made any application in writing to the petitioners, for a track connection, either in advance of the institution of the proceeding or during its progress. Under the statute, as it was at the time the proceeding was instituted, the jurisdiction of the Commission was conditioned upon an application in writing having been made by a shipper (I. C. C. *vs.* D. L. & W. R. Co., 216 U. S., 531), and no such application has been made.

Granting that the Commission is and should be liberal in allowing the right of intervention, it does not follow that jurisdiction attached upon the appearance in the case in the manner stated, of the two shippers mentioned. Their appearance availed nothing, since they had not complied with the statute by making an application in writing to either of the petitioners.

It is true that the statute was amended so as to allow an "owner of such lateral, branch line of railroad" claiming to be within its contemplation to file such a proceeding upon having made an application in writing, but it is not understood how this amendment

can be held to have cured the infirmity in the proceeding brought by the Traction Company. The Act to Regulate Commerce, *quoad* this matter, confers no authority upon the Commission except to investigate a complaint brought by a party competent to bring it; but the complaint in this instance was not brought by such a party, and there was therefore no real complaint in existence throughout the long period while the investigation was in progress.

There is no principle or reason upon which it can be held that a case either in a court or in an administrative tribunal, which, from a jurisdictional point of view, was a bad case, or rather no case at all, up to the time of the argument becomes a good case because there is a change in the law, while it is in progress, extending the jurisdiction.

As said in Jackson *vs.* Scandland, 65 Mississippi, 481, at 488:

> "It is settled that the facts which constitute the ground of a suit must exist at the time the suit is instituted; and it cannot be maintained by supplementing it with matter occurring after its institution."

Especially is this true, if as in the case at bar, the applicant shippers are mere dummies introduced as an afterthought to avoid the effect of the decision of this Court in the Lackawanna case.

(c) The Commission or Congress cannot require an interchange of cars with a competing line and without providing for their return and compensation for their use.

(*c*) In subdivision (*b*) of Point I we have pointed out the unconstitutional effect of the Commission's order in that the requirement to furnish cars follows from the statute itself if the traction line is a lateral branch. Equally would the order of the Commission be void if it require the

steam roads to deliver their cars to the Traction Company, or *vice versa*. The order (Transcript, page 24) requires through routes and rates to be established "in order that shippers * * * may have access to and from interstate points by interchange of cars under through billing and through charges."

In short, if the statute is construed to require the trunk lines to furnish cars to a competing line without protection as to compensation and return the statute would be unconstitutional; and on the other hand, if the order of the Commission accomplishes the same result, the order is void.

Of these three objections the Commerce Court (see opinion, Transcript of Record, page 28) said:

> "These are serious objections which would have to be carefully considered except for the conclusion which we have reached on the underlying question, viz., whether the traction company's road is a 'lateral, branch line of railroad' within the meaning of the statute, which, if found against that company, is conclusive."

(d) The order of the Commission is invalid becaues the foundation of the order was the independent investigation of the Commission not contemplated or permitted by the Commerce Act.

(*d*) The report of the Commission by Harlan, Commissioner (20 I. C. C. Reports 494) appears as Exhibit No. 2 with the Petition and is printed in full in the Transcript of Record. By reference to page 15 of the Transcript we find this language used by the Commission:

> "Giving due weight to the testimony of witnesses on each side of the controversy, *but basing our conclusions more largely upon our own investigations*, we think the complainant will have no difficulty in moving regular line equipment over its road."
>
> (Italics ours.)

Undoubtedly the Commission may take judicial notice of matters appropriate for judicial notice, but the Commission must base its findings upon the evidence and cannot base its findings upon its own investigations made without the knowledge and without opportunity to the carrier affected to cross-examine or controvert.

Before passing the argument of this point we direct attention to the assertion on page 28 of the brief for the United States that "Both the petitioners and Traction Company know that this point was being investigated" &c., the fact being, as on demurrer is admitted, that as stated in the petition (Tr. p. 8) "the petitioners were not advised of and do not know what investigations are referred to" (in the report of Commissioner Harlan) "or when or by whom they were made."

In Oregon R. R. & Nav. Co. *vs.* Fairchild (224 U. S. 510 cited above) this court by Mr. Justice Lamar on April 29, 1912, stated at page 525, first sentence, the limitation of due process as to the evidence in support of an order of a state commission requiring track connections, thus:

> "The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen, but to give legal effect to what has been established."

As was said by the Commerce Court in Atlantic Coast Line R. Co. *vs.* Interstate Commerce Commission, 194 Fed. 449, 457, decided December 5, 1911:

> "The commission, in the investigation of any question, may bring to its solution the accumulated experience and expert knowledge of its members, and it would be its duty to do so, but before an existing rate may be condemned there must be a finding of some sort that it is unjust and unreasonable (Interstate Commerce Commission *vs.* Stickney, 215 U. S. 105, 30 Sup. Ct. 66, 54 L. Ed. 112), and this finding must be

based upon evidence of which the carrier is apprised so that it may meet the case brought against it if it so desires."

In Trustees of Saratoga Springs *vs.* Saratoga Gas E. & P. Co., 191 New York, 123, it was objected that the Public Service Commission law of New York was unconstitutional for the reason, among others, that it permitted just such independent investigation as the Interstate Commerce Commission appears to have made in the case at bar. But the Court of Appeals, in construing the statute, which was not substantially different from the Federal law with respect to hearing and notice, met this objection by construing the state legislation to require notice of all evidence considered. The Court said, 191 New York, 147:

> "It is also objected that any order made by the Commission may be based not only on the evidence and proceedings had at the public hearing provided by the statute as a prerequisite for making any order fixing maximum rates, but on the *ex parte* statement of the officers, agents, and inspectors of the commission, of which a company may have no knowledge, and to controvert which no opportunity is afforded. We do not so construe the statute."

After referring to several sections of the law, among them one expressly authorizing the Commission, by its agents and inspectors, to inspect the work, system, plants and books of a public service company, the court continued:

> "As we read the statute the investigation and report of agents and inspectors are to follow the filing of any complaint, and to precede or to be made during the public hearing. This is made clear by section 18, which provides that orders made by the commission on its own notice or without complaint shall be made only after reasonable notice to the corporation and reasonable opportunity to such corporation to prepare its de-

> fense or objection to the demands of the commission. It is plain that no corporation could make its defense until it was clearly notified of what was charged against it, and the proof to support such charge was given. While the commission might not be bound by technical rules of evidence, still it was plainly intended that the whole proceeding should assume a *quasi* judicial aspect. * * * The Commission being empowered to subpœna witnesses and take testimony, its inspectors or agents could be required to appear and verify any reports made by them; or, if we assume that such reports could be received in the first instance without verification, the inspectors or agents could be compelled to attend at the instance of either party, and be examined as to the truth of the statements in their reports and their knowledge of the facts therein contained."

In People *vs.* Public Service Commission (127 App. Div. 480) 112 New York Supplement, 133, a similar question was suggested and the court said at 135:

> "Ordinarily the Board of Railroad Commissioners is not subject to the same rules as to the admission of evidence as applies in a court of justice; and their proceedings should not be vacated for an erroneous ruling in rejecting or receiving evidence *except where such evidence might be controlling.*"

In Interstate Commerce Commission *vs.* Union Pacific R. Co., 222 U. S. 541, 547 (1912), Mr. Justice Lamar pointed out that questions of fact may be involved in the determination of questions of law so that an order of the Commission regular on its face may be set aside if it appears that "the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it."

If the Commission acts as in the case at bar "basing our conclusions more largely on our own investigation" than upon the testimony of witnesses, it becomes obvious

that the Commission's conclusions and order can never be re-examined and the question of law, which is with the courts, as Mr. Justice Lamar has said, can never be determined whether there is evidence to support the order.

In Oregon R. R. & N. Co. *vs.* Fairchild, 224 U. S. 510 (1912), the court examined the evidence which was urged to support an order of the State Railroad Commission requiring track connections between a railroad and a competing and parallel electric line at certain points for the interchange of business, and held, that the evidence did not sustain the order requiring the connection and accordingly was not due process of law required by the 14th Amendment. Mr. Justice Lamar delivered the opinion of the Supreme Court reversing the Supreme Court of the State of Washington and said at page 533:

> "The burden was on the commission to establish the allegations in the complaint. That body, as well as the carrier, was charged with notice that the reasonableness of the order was to be determined by what appeared at the hearing before it. The insufficiency of the evidence submitted to the commission could not, under this statute, be supplied on the judicial review by a presumption arising from the failure of the carrier to disprove what had not been established."

Congress as to due process is by the 5th Amendment subject in the enactment of the Interstate Commerce Act and the creation of the Interstate Commerce Commission to the same limitation of due process which is imposed upon the states by the 14th Amendment.

In this connection it becomes appropriate to notice the contention of the Assistant Solicitor for the Interstate Commerce Commission in his brief at page 25, that

> "Whether the connection is practicable and safe, and whether there is sufficient business to warrant the expense, are questions of fact"

exclusively for the Commission to determine. Truly these questions are questions of fact but the point in the case at bar is that the question whether the traction line was sufficient to carry the steam equipment (also a question of fact) was resolved more largely upon the *ex parte* investigations of the Commission than upon the testimony of the witnesses, so that the finding as to the fitness of the Traction line for the operation of the freight cars of the steam roads was not based upon the evidence and was for that reason illegal.

An order of the Interstate Commerce Commission not founded upon the evidence is not due process of law.

It is submitted that any one of the foregoing grounds would be sufficient on which to found the decree; and if this be so, then the decree must be affirmed, irrespective of the question as to lateral, branch line.

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OCTOBER, 1912.

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In the

Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES OF AMERICA, THE Cincinnati and Columbus Traction Company, and Interstate Commerce Commission, Appellants,

vs.

THE BALTIMORE AND OHIO SOUTHwestern Railroad Company and The Norfolk and Western Railway Company, Appellees.

No. 648

APPEAL FROM THE UNITED STATES COMMERCE COURT.

SEPARATE AND SUPPLEMENTAL BRIEF OF ARGUMENT FOR THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, APPELLEE.

It is the purpose of this separate brief to set forth some arguments on behalf of The Baltimore & Ohio Southwestern Railroad Company, in addition to those in the principal brief for the appellees, in which the writer hereof joined, and which has been filed on behalf of both railroad companies.

The authority to order a track connection at Hills-

boro and at Madeira was rightly assumed by the Interstate Commerce Commission and the Commerce Court to be found, if it exists at all, in the last paragraph of Section 1 of the Interstate Commerce Act as amended June 18, 1910, which is published in Part 1, Volume 36, United State Statutes at Large, at page 547. In their briefs filed in this court, counsel for the Interstate Commerce Commission, as well as counsel for the United States, concur in this respect in the views of the Commission and of the Commerce Court.

Their claim is that The Cincinnati and Columbus Traction Company is a "lateral, branch line of railroad" within the meaning of this statute, and authorities defining lateral railroads and branch railroads are extensively quoted and cited in their briefs.

At the expense of repetition the paragraph in question is here quoted in full:—

> "Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make com-

plaint to the commission, as provided in section thirteen of this Act, and the commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided, for the enforcement of all other orders by the commission, other than orders for the payment of money."

I.

It is to be observed that the line of the Traction Company is strictly within the definitionof a parallel and competing road.

Commonwealth vs. L. & N. R. R. Co., et al., 144 Ky. 324, 330, and cases cited.

East St. Louis Connecting Railroad Co. vs. Jarvis (34 C. C. A. 639), 92 Federal Reporter, 735, clause two of syllabus and opinion at 741, 742.

In the case first cited, the court say—144 Ky. 330:—

"Two parallel lines of railroad are not necessarily two lines equidistant from each, but are lines running in one general direction, traversing the same section of country and running within a few miles of each other. Two lines are parallel when they run between the same two points or localities (citing cases). It was perceived by the makers of the constitution that if there were two lines of railroad between two localities there would be more or less competition between them, and so they provided that one should not buy the other."

Between Hillsboro and Cincinnati, therefore, the

lines of the appellee railroads and of the appellant Traction Company are strictly parallel and competing.

II.

Assuming without conceding that the Traction Company's route may properly be described as "lateral" or "branch", it certainly is not such within the meaning of the statute quoted.

It is one of the requirements of the statute that the common carrier whose line is connected with the "lateral, branch line of railroad" shall "furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper". And it is provided that if the common carrier shall fail to install *and operate* a switch or connection *as aforesaid,* it may be required on application therefor in writing by any such shipper or owner of such lateral, branch line of railroad so to do. In other words, it is the requirement of the statute that the trunk line not only make the connection, but furnish cars for the use of the shipper on the lateral, branch line. But such a line and a "private side track" are placed on the same footing, and in determining what is meant by the former the maxim *noscitur a sociis* applies. It is not to be supposed that a connection with a private side track is required and yet that the owner of the siding shall be made to furnish his own cars up to the point of connection, the duty of the common carrier being limited to the operation of its own line and the connection. For such side tracks, when connected up, become part of the line of the carrier for the purposes of receipt and delivery of freight for the owner thereon.

Vincent vs. C. & A. R. R. Co., 49 Illinois, 33, 41.
1 Wyman on Public Service Corporations, section 817.

It is immaterial to the decision of this case whether,

owing to the length of the private siding or the lateral, branch line, or for any other reason, an additional charge may be made. Neither is it possible to separate the requirements with respect to private side tracks from those with respect to lateral, branch lines of railroad, so as to construe the statute to require in both cases the making of a connection, but in only one the furnishing of cars.

When the law-making body undertook to put owners of lateral, branch lines of railroad and owners of private sidings on the same basis as to track connections, the furnishing of cars, and the right to apply to the Commission for orders in connection therewith, it in substance affirmed that the lateral, branch lines were such as properly could be classed with private sidings.

Congress must, therefore, have had in contemplation as a lateral, branch line something different from the ordinary description of railroad. That this is so is evidenced not only by the history of the proceedings in Congress to which reference is made in the joint brief for the appellees, and which was also called to the attention of this court in Interstate Commerce Commission vs. D. L. & W R. Co., 216 United States, 531, 535 (abstract of argument, paragraph preceding opinion of the court), but is shown still more plainly by the record submitted to this court in Baltimore and Ohio Railroad Co. vs. Pitcairn Coal Co., 215 United States, 481.

See record filed in this court in the Pitcairn case November 10, 1908, Case No. 289, October Term, 1909, printed copy, paragraph at pages 467 and 468, where it is said "The Baltimore and Ohio Railroad Company has been supplying its cars for operations on the Cumberland and Pennsylvania Railroad since 1843." See, also, the opinions of the lower courts—that of District Judge Morris at pages 289 to 305, and that of the Circuit Court of Appeals at pages 899 to 921, as printed in the above record.

For convenience of reference, attention is called to the reports of that case in the lower courts as published in the Federal Reporter.

In United States ex rel. Pitcairn Coal Co. vs. Baltimore & Ohio R. Co., 154 Federal Reporter, 108, the Cumberland & Pennsylvania Railroad Company was described as a lateral road whose equipment was furnished by the Baltimore and Ohio. At page 109, District Judge Morris, stating the facts, said:—

> "This petition for mandamus, to require the Baltimore & Ohio Railroad Company to cease from subjecting the relator and other coal companies on the Monongah Division to undue and unreasonable discrimination in the shipping and transportation of coal, was filed January 16, 1907, by the relator, the Pitcairn Coal Company, a corporation of West Virginia, against the Baltimore & Ohio Railroad Company and the Cumberland & Pennsylvania Railroad Company and thirty-seven coal companies, most of them operating mines in West Virginia in what is known as the 'Fairmont region.' Of the defendants the Fairmont Coal Company, the Clarksburg Fuel Company, the Pittsburgh & Fairmont Fuel Company, the Southern Coal & Transportation Company, the Consolidation Coal Company, and the Somerset Coal Company are allied companies, practically all controlled by the Consolidation Coal Company, which also owns substantially all the capital stock of the Cumberland and Pennsylvania Railroad Company. The majority of the stock of the Consolidation Coal Company until May, 1906, was owned by the Baltimore & Ohio Railroad Company, and was then sold by the Baltimore & Ohio Railroad Company to Clarence W. Watson, acting for himself and his associates; the railroad company retaining a lien for a portion of the purchase money."

After considering a number of other questions, District Judge Morris said at pages 119 and 120:—

"A cause of complaint urged by the relator is that coal cars of the Baltimore & Ohio Railroad Company's equipment before they reach the Monongah Division of the West Virginia & Pittsburg Railroad operated by the Baltimore & Ohio Railroad Company are allotted to the Cumberland & Pennsylvania Railroad at its junction with the Baltimore & Ohio Railroad at Cumberland, and that this arbitrary allotment prevents cars coming to the Monongah Division, and gives an undue advantage to shippers on the Cumberland & Pennsylvania Railroad, to the prejudice of the shippers on the Monongah Division when there is a shortage of coal cars. The coal traffic on the Baltimore & Ohio Railroad began in 1843, and until 1855 was all from the Cumberland region and from mines *none of which were located on the Baltimore & Ohio Railroad, but were reached by lateral roads from the mines* to the Baltimore & Ohio Railroad at Cumberland and Piedmont. Several of the lateral roads became incorporated in the Cumberland & Pennsylvania Railroad, which practically is a combination and extension of the lateral roads to which, for half a century, the Baltimore & Ohio Railroad *has been supplying equipment* and by which the coal traffic which is its most important business was started and has been built up. It cannot be maintained that fair treatment to the new coal mines of the Fairmont region which are on the line of the Baltimore & Ohio Railroad requires that the old-established mines *on these lateral feeders* shall be deprived of the equipment which for half a century has been *furnished to them* and was being furnished when the relator began operating

its mine. The equipment furnished is based on the number of cars the Cumberland & Pittsburgh Railroad has had in previous years, and there is no sufficient evidence to show that it is an unfair allotment and works an unjust discrimination against the relator."

When the case came before the Circuit Court of Appeals—United States ex rel. Pitcairn Coal Co. vs. Baltimore & Ohio R. Co., 165 Federal Reporter, 113—that court in its opinion, beginning with the last line at page 114, substantially quoted the description given of the Cumberland & Pennsylvania Railroad Company by the Circuit Court. At page 131 the court quoted the provision of Section 1 of the Interstate Commerce Law as to lateral, branch lines of railroad, as the same was then in force, and at pages 131 and 132 observed:—

"It was undoubtedly the purpose of Congress in the enactment of this clause to secure for shippers located on branch or terminal lines the same kind of treatment that is accorded to those whose mines are located on the main line of the carrier, and, as we have heretofore said, we think the court's ruling to the effect that this is a branch or lateral line of the Baltimore & Ohio Railroad is proper, in view of the testimony bearing on that subject. However, when we come to consider the allotment of cars by the Baltimore & Ohio Railroad Company to the Cumberland & Pennsylvania Railroad Company, *we are of opinion that such allotment should be made on the same basis by which the Baltimore and Ohio Railroad is required to allot cars to its own shippers.* We do not understand upon what theory the system now in vogue, by which cars are allotted to these branch or lateral lines of road, can be sustained. Therefore we think that the Baltimore & Ohio Railroad Company

by the provisions of the interstate commerce act *is required to furnish cars to the Cumberland and Pennsylvania for the use of shippers on said road*, but in doing so, due regard should be had to the system by which the Baltimore & Ohio Railroad Company distributes its car service to the patrons along its lines."

It is quite true that the judgments of the Circuit Court and the Circuit Court of Appeals were reversed by this Court—215 United States, 481—and of course the passages from the opinions of the lower courts are not quoted as authority. They do, however, illustrate in the most forceful manner what Congress may have had in mind when it provided not only that a connection could be required with a "lateral, branch line of railroad," but also that the principal line should *furnish equipment for the use of shippers on such lateral line*. These opinions and the record of that case in this court, cited at page 5 above (record, pages 467, 468 and 460 middle paragraph), indicate that since 1843 there has been a class of railroads in this country known to shippers not only as lateral, branch lines of railroad, but as lines whose equipment has been furnished by the trunk lines with which they are connected. It is certainly fair to suppose that those interested in this particular legislation and in bringing about the amendment of June 18, 1910, were familiar with this class of lateral, branch lines of road, and that the double requirement of track connection and furnishing of cars was inserted with that in view. And as the last amendment followed upon the decision of this court in the Rahway Valley case (216 United States, 531), and the decisions of the lower courts in the Pitcairn case, it is at least very suggestive that even if the interpretation of these words for which we contend was not prominently in the mind of Congress in 1906, it was so at the time of the amendment in 1910.

Moreover, had Congress intended in 1906 or when amending the act in 1910 to provide that a railroad company be "required to furnish cars" to a parallel and competing line, it most certainly would, in view of the decisions in the Stock Yards cases (192 United States, 568, and 212 United States, 132), have used words clearly evidencing such intent and negativing the thought that the requirement was limited to lateral, branch lines and private side tracks.

Further, it is elementary that a court will look to the "history of the times" in determining what a statute means. (11 Ency. of U. S. Supreme Court Reports, 144, note 57). This it may learn not only from the ordinary current periodicals, but from the reports of decisions of lower courts and administrative tribunals, the correctness or incorrectness of their opinions as to the law being immaterial from the standpoint of determining from them the practical existing conditions, of which Congress may be presumed to have been advised.

It is well known that lateral, branch lines, which are in many respects only plant facilities, and so rather themselves to be classed as private side tracks than as trunk lines or railroads proper, are common throughout the country, and have been for many years. Their status as shipping facilities rather than common carriers has been recognized by the Interstate Commerce Commission time and again. See, for example—

> Crane Railroad Co. vs. Philadelphia & Reading R. Co., 15 I. C. C. Rep. 248; and
>
> Crane Iron Works vs. Central Railroad Co. of New Jersey, 17 I. C. C. Rep. 514;

in the first of which cases it was distinctly held that "through routes and joint rates on interstate shipments" could not lawfully be established between the Crane Railroad Company and a trunk line.

In view of the requirement that common carriers subject to the provisions of the statute furnish cars

not only for private side tracks, but for lateral, branch lines of road, it may well be that Congress had in mind, among others, such lines as that of the Crane Railroad Company, deeming that it might constitutionally make such requirements as to them, although manifestly that could not be done as between two such roads as—for example—the Southern and Louisville & Nashville, which were interested in the Stock Yards cases (192 U. S. 568 and 212 U. S. 132).

Whether, in going so far as to require the furnishing of cars for lateral, branch lines, as well as for private side tracks, Congress acted within its powers need not be determined until a road coming within that description shall present its case to the court. It is entirely clear that if the statute be construed as applicable to a carrier such as The Cincinnati & Columbus Traction Company, it would apply with like force as to the Southern or the Louisville & Nashville, and would be unconstitutional.

As between two constructions, one of which clearly would render the statute unconstitutional as in direct conflict with a prior decision of this court (192 U. S. 568), and the other of which would only suggest doubts as to its validity, there can be no hesitation as to which should be adopted. And whatever else may be said of it, the line of The Cincinnati & Columbus Traction Company is not a "plant facility," and its owners can not, without further legislation for their protection, require these appellees to turn over their equipment for its use.

It is not enough, therefore, that counsel for the Interstate Commerce Commission and the Government establish by their authorities that The Cincinnati & Columbus Traction Company is in one sense of the word a "lateral, branch line of railroad." They must go further and show that it is so closely allied to shippers as to bring it within that class of such railroads which may fairly and constitutionally be entitled to have cars furnished it by the appellees

for the use of shippers on its line on an equal basis with those on their own lines.

III.

The Traction Company is a corporation organized under the laws of the State of Ohio as a street electric railroad, and is not and never was engaged in interstate commerce, and Congress in the Interstate Commerce Act has not covered such a carrier, and its charter rights and privileges are such as that it can not properly be made a connecting road with the appellees.

There is no question but that the power of Congress as to interstate commerce is absolute as against the rights of the states; but in determining what is meant by a "lateral, branch line of railroad", as well as in determining whether through routes or rates should be established, the essential character of these artificial bodies can not be ignored. The differences between the charter of the Traction Company and those of the steam railroad companies are fundamental, and being embodied in the statutes of Ohio, are of course judicially noticed by this court and the Commerce Court.

The Ohio law respecting street and interurban railroads is contained in the General Code of Ohio, sections 9100 to 9149, inclusive, and in supplemental and amending sections, while steam railroad companies are governed and controlled by sections 8922 to 9099, and supplemental and amending sections. By reference to the sections cited it will be seen that the provisions for the government of steam railroads are wholly dissimilar from those for the government of such railroads as that of the Traction Company, in the following particulars, among others, namely, as to track elevation (sections 8763 et seq.); diverting roads or streams (8773); construction of bridges (8774); bridging of canals or navigable rivers (8775); the height of bridges over canals (8776 and 8777); joint use of bridges (8779 and 8780); the

power to aid connecting lines and to lease or purchase other railroads (8806-8814); regulations as to crossings of other railroads (8826 et seq.); the avoidance of grade crossings (8835 et seq.); crossing of tracks of other steam railroads in municipalities (8840); changing of grades (8841); regulations with respect to highway crossings (8843 et seq.); regulations with respect to private crossings and ways over their tracks (8858 et seq.); altering or abolishing grade or other crossings (8863 et seq.); crossings of railroads by highways subsequently constructed (8895); drainage (8908); fences, cattle guards and crossings (8913 et seq.); equipment of engines and the doctrine of negligence in connection therewith (8944 and 8945); automatic air brakes (8946); power brakes on engines (8947); and for cars (8949); automatic couplers (8950); grab irons (8951); draw bars (8952); inspection laws (8957-8965); liability for fires (8966-8974); construction of overhead wires (8975-8976); the rates to be charged for freight transportation (8980-8988); the minimum recoverable as damages in certain cases (8991); as to storage and warehouses certificates (8995); as to switching cars of other companies and allowances therefor and penalties on account thereof (8998-9004); hours of service(9007); blocking frogs and the like (9009); liability for injuries to employees (9015-9018); consolidation and other charter powers and provisions (9025-9053).

These fundamental differences were recognized by the Ohio Legislature when it provided in section 522 of the General Code (quoted by the Commission in this case, 20 I. C. C. Rep. at 487, and page 9 of the transcript) as follows as to track connections:—

> "Steam railroad companies as between themselves, and interurban and electric railroads as between themselves, shall afford reasonable and proper facilities for interchange of traffic be-

> tween their respective lines, for forwarding and delivering passengers and property, and shall transfer and deliver without unreasonable delay or discrimination cars, loaded or empty, freight or passengers, destined to a point on its own or connecting lines ....."

Attention is called to some of the foregoing statutory provisions, as marking the essential difference between the two classes of railroads as to rights they may derive from counties and municipalities. This dissimilarity has been often commented on by the state courts.

> "The statutes of this State relating to railroads are separate and distinct from those relating to street railroads." Massillon Bridge Co. vs. Cambria Iron Co., 59 Ohio State, 179, syllabus by the court.

> "An interurban electric railroad is classed as a street railroad by the statutes of this State". C. L. & A. Elec. St. Ry. Co. vs. Lohe, 68 Ohio State, 101, clause one of syllabus. See also Commissioners vs. Scioto Valley Traction Co., 75 Ohio State, 548.

It is not contended that track connections and inter-change of cars may not be required on the sole ground that one of the carriers operates by steam and the other by electricity, or that one renders an interurban service and the other is an established trunk line traversing several states. Interurban electric roads often (as in Illinois) have the same charter powers as steam railroads, and are organized under the steam railroad laws and *constructed, maintained and operated in conformity thereto.* Such is not the case with respect to The Cincinnati & Columbus Traction Company.

See Ecorse Township vs. Jackson A. A. & D. Ry. Co., 153 Mich., 393 (117 Northwestern, 89), wherein,

at page 397 (117 Northwestern, 91), the court quotes from the opinion of Judge Cooley in Grand Rapids & Indiana R. Co. vs. Heisel, 38 Michigan, 62, as to the fundamental differences between steam and street railways. A requirement that they become in effect partners in business would be to confer upon each of them property rights as against municipal corporations and property owners, and give the steam railways, for example, interests and privileges in and over the streets which it was never intended they should have.

The Traction Company is not engaged in interstate commerce, and it is of course a truism that the State of Ohio may not forbid or interfere with such commerce. But in determining whether connections should be made between the lines of these petitioners and that of the Traction Company, regard must be had to the nature and character of the electric line, as evidenced by its state charter and the business it conducts, as also the equipment with which it is expected to be supplied and the road bed and right of way it maintains and operates. Congress in the Interstate Commerce Act has not legislated with a view to incorporating carriers nor taken away from the states the right to determine the charter limitations of their corporations. And the holding of the Commission in this case is inconsistant with its own previous rulings.

> Cosmopolitan Shipping Co. vs. Hamburg American Packet Co., 13 I. C. C. Rep. 266, 280; and In Re Parmalee Company, 12 I. C. C. Rep. 39.

In the last cited case, the question was whether, under the Interstate Commerce Act, section one of the pass provisions, a pass could be lawfully issued by a steam railroad to an employe of the Parmalee Company, which was a transfer company in Chicago en-

gaged in intrastate business, transferring passengers and baggage to and from the railroad stations and places in Chicago. This question went back necessarily to that of whether the Parmalee Company was a carrier subject to the Act to Regulate Commerce. The Commission found it was not such a carrier.

Would there be any doubt under the ruling of the Commission (which we do not question) in the Parmalee case that the two steam lines in the case at bar could not lawfully issue exchange passes to the employes of The Cincinnati & Columbus Traction Company? If the contention of counsel for the government is correct, then it must follow that if this track connection were ordered made, the conductors and motormen of a Traction Company operating its cars from point to point in Cincinnati would be entitled to interstate transportation over the trunk lines from Maine to California.

Considering the charter rights and powers of the Traction Company, its status is more analogous to that of a drayage or transfer or stage company than to that of a steam railroad company engaged in interstate commerce. And as to a stage company, the Interstate Commerce Commission has distinctly decided—and we doubt not correctly (with reference to a stage line operating in Yellowstone Park), in Wylie vs. Northen Pacific Ry. Co., 11 I. C. C. Rep. 145, 154, as follows:—

> "We hold that the defendant railway is without authority to make traffic agreements, of the nature and effect shown in this case, either with the transportation company which provides stages for touring the park or with the association which conducts the hotels therein. *The parties are not competent in law to form through routes and establish joint rates* as provided in the sixth section of the Act to regulate commerce, and the circular or tariff under which the rates

and tickets in question are provided cannot be regarded as a joint tariff established by connecting carriers under authority of that statute."

It may be assumed that Congress could, if it saw fit, provide that stage companies or common carriers by ordinary vehicles should as to their interstate commerce be brought under the jurisdiction of the federal law, and made connecting carriers with respect to steam railroad companies, and that additional charter powers and rights with their corresponding obligations, might be conferred upon such a corporation as The Cincinnati & Columbus Traction Company. But that has not yet been attemped.

After all, the error of the Commision runs back to the fundamental error, detected and corrected by the Commerce Court, of ordering switch connections and through routes with a competing and parallel interurban traction company which was not and never could be a lateral, branch line of railroad within the meaning of the Act of Congress upon which alone the jurisdiction of the Commission depended.

Respectfully submitted,

EDWARD BARTON,

Attorney for The Baltimore and Ohio Southwestern Railroad Company, Appellee.

Cincinnati, Ohio, October, 1912.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES OF AMERICA et al,
Appellants,

No. 648. *vs.*

THE BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY and THE NORFOLK AND WESTERN RAILROAD COMPANY,
Appellees.

BRIEF FOR APPELLANT, THE CINCINNATI & COLUMBUS TRACTION COMPANY,

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This case was brought in the Commerce Court by the Baltimore & Southwestern Railroad and the Norfolk & Western Railroad Company against the United States Government and the Cincinnati & Columbus Traction Company. Afterwards the Interstate Commerce Commission intervened. The purpose of the action was to enjoin the enforcement of a certain order made by the

Interstate Commerce Commission in favor of the appellant, the Cincinnati & Columbus Traction Company. The Cincinnati & Columbus Traction Company is what is known under the laws of the state of Ohio, as an Interurban Electric Line, running from the city of Norwood, contiguous to the city of Cincinnati, Ohio, to Hillsboro, in Highland county, in said state. Under the laws of the state of Ohio, its charter powers include the right to carry freight, mail and express, and it is so substantially built, as to enable it to do all sorts of business that is usually transacted by what is known as a steam or commercial railroad.

On or about January 21st, 1909, this appellant filed with the Commission its petition grounded upon the Interstate Commerce Law, asking that an order be made directing a physical connection between the roads of defendants, and the road of this Interurban road at Madeira, and at Hillsboro, Ohio, where the roads approach each other and come into close proximity, and said petition included a prayer for connection with the Cincinnati, Lebanon & Northern Railroad at Norwood, where the two roads come within five (5) or six (6) feet of each other. The petition further asked for the establishment of through routes. This appellant's railroad crosses the Norfolk and Western Railroad, at a point very close to Hillsboro.

This petition to the Commission was heard, and a large amount of evidence introduced, and finally resulted in an order of the Commission granting the prayer thereof as to the physical connections and directing the establishment of through routes, and rates between and including Boston on the West, and Dodsonville on the East, and it

was this order that the complaining roads in this case sought to have annulled. It was annulled by the Commerce Court. The petition filed with the Commission was grounded upon Sections 1 and 15 of the Interstate Commerce Act. The facts upon which this court may be called upon to act have been set out at large in the printed briefs on file.

Much has been said in this case by way of argument that the appellant traction road is not a branch or lateral road, within the meaning of Section 1 of the Act, but an independent and competing line. The question is argued as to whether or not the traction road belonging to the appellant company could consolidate with the road of the appellees, under the statute laws of the state of Ohio, and further whether the Commission had any power without the knowledge of both parties, to send somebody over the road to look at its physical condition, and whether or not it had any power to decree a connection at the expense of the Traction Company, without violating the constitutional provision that the appellees were deprived of their property without due process of law.

The Commerce Court itself grounded its decision upon the one simple fact that the road of the appellant Traction Company was not within the law, because not included within the definition of a branch or lateral railroad, and therfore if the Commission received evidence that it ought not to have received, and ordered a connection without fixing the compensation to the appellees, this did not deprive the Commission of jurisdiction if it was once vested. They were merely errors committed in the trial of the case, which could be remedied upon a retrial, without holding that the Commission had no juris-

diction. The rule is, that if in a court of error, it appears that the court below decided the case upon some one proposition which is erroneous, and did not consider the merits of the controversy at all, the judgment should be reversed, if that single proposition is erroneous. In other words, everything else is mere error of procedure, not going at all to the right of the Commission to hear the controversy in a proper way.

The court went to the root of the matter in this case. The alleged invalidity of the order of the Interstate Commerce Commission was grounded upon several technical objections, but the real gist of the controversy finally hinged upon the fundamental power of the Commission, and upon the point that the Traction Company's railroad was neither a lateral nor a branch railroad, nor a lateral-branch railroad—whether the law refers to one or two classes of railroad by the use of those two words—within the meaning of the law.

The Traction Company is incorporated under the laws of the state of Ohio, and owns and operates, by electric power, an Interurban Railroad between the city of Norwood contiguous to the city of Cincinnati, Ohio, and Hillsboro, in Highland county, Ohio, a distance of about 53 miles. It is of standard gauge with seventy pound steel rails and Weber joints. Its superstructure is solidly and substantially constructed, and in every way is fitted to do a freight business of moderate dimensions. These roads are denominated Interurban Roads under the laws of the state of Ohio. They are in some respects likened to street railroads, in other respects to steam railroads, depending upon the locality in which they run and the nature of their service. In cities they are like street rail-

roads. Outside of cities like steam railroads. But after all, they are Interurban Railroads, and neither street nor steam railroads; outside of cities they have power of condemnation of private property for their legitimate purposes. Inside cities they have power of condemnation for certain enumerated purposes only. They are authorized to carry freight, mail and express.

See General Code of Ohio, Secs. 9100, *et seq.; Ohio* v. *Dayton Traction Co. et al,* 18 Cir. Ct., 490, affirmed 64 O. S., 272.

It seemed to weigh very much upon the mind of the court at the hearing that this Interurban Railroad was different from an ordinary commercial railroad, and that it was an independent and competing road, and for these reasons was not a lateral, a branch, or a lateral-branch railroad, and therefore was not covered by the terms of the law. The court betrayed much anxiety to ascertain whether or not the road of the Traction Company, if it were something other than it is, if it were a steam or commercial railroad, under the laws of the state of Ohio, could be consolidated with either of the complainant's roads.

The Commission in its opinion on record, page 30, classes this appellant's road, not as a lateral or branch road, but as an independent and competing line. Of course, to say that Congress has no power to include an independent or competing line within the Commerce Law, would be a fallacy. The only question is, what did Congress intend to enact. If by an independent line, the Commerce Court intended to draw distinction between organizations, to-wit, whether the line was a branch or lateral stem of the main road of one of the appellees, un-

der the same ownership and organization, or one which was under separate ownership and organization, it would seem that the answer is obvious if our road was owned by one of the main companies, it could hardly make an application, or enforce one, for the reason that the application would be to itself, and the proceeding, if the application were denied, against itself, and hence we must start out with the theory that the lateral or branch railroad intended to be reached by the law, is necessarily one independent of the appellee's road.

Again, if it were the former kind of branch, no application could be made except by a shipper or receiver of Interstate Commerce and could only be on the ground of discrimination by the main stem against certain localities and portions of its own line.

The purpose of the Commerce Law is to prohibit and restrain all discriminations. It makes no difference whether the discrimination is between localities on its own line, or as against other means of conveyance. Any road that would approach another could be a branch of that other, or an independent line. It would therefore seem that the effect that the complaining road is an independent line would cut no figure in the case at all, as evidently the law can only apply to such a line. It is therefore submitted that that method of differentiation as a working basis, is unsatisfactory. On the other hand, if it is sought to add to that by calling it a competitive line, we venture the assertion that no line, branch, lateral, or a road which is a mere continuation in a straight line of the other, can be wholly non-competitive, but competition in the first place is favored by the law, and in the next place, it is made no ground of distinction by the law itself.

All roads that are near enough to each other to require running arrangements, are more or less competitive, some indirectly and to a small degree, and others directly, and as to their main through business. It is difficult therefore to understand how independence and competition can remove a railroad from the remedial operation of the law.

It is stated in the opinion of the Commerce Court that it was admitted that the appellant railroad, under the laws of the state of Ohio, could not consolidate with one of the appellees. So it was admitted, but not on the ground that it was parallel or competitive with the appellees' railroad; but simply because no roads can consolidate without statutory authority, and in the state of Ohio there is statutory authority for the consolidation of steam railroads with each other, and for the consolidation of Interurban Railroads with each other, but there is no statutory authority for the consolidation of Interurban Railroads with Steam Railroads, and in fact, by the terms of the respective laws, such a consolidation is excluded.

It may be true that the Legislature of the state of Ohio did not see fit to make the latter kind of consolidation legal, because the two classes of railroads are organized under different laws, are generally constructed in different ways, and, to a large extent, serve different purposes, but the true reason why they can not consolidate is as above stated, that the statutes do not permit it. This consideration does not alter the fact, however, that in certain respects, and among others the carriage of freight, they do serve the same purpose, and where that purpose is to engage in interstate business, no question can arise as to the power of Congress to delegate to the Interstate

Commerce Commission the same power to regulate that business as exists over the regulation of two steam railroads.

It is a simple question, therefore, and the Commerce Court admits it, whether Congress has delegated the power to the Commission to regulate Interstate Commerce between railroads like the appellant's and the appellees' road. A full consideration of the cases would seem to establish that the appellant road is not a competing road with the railroad of either of the appellees, in the sense that the business is exempt from the operation by the Interstate Commerce Law, because that either one of the appellees might not purchase and own the appellant road, or even consolidate with it. If the distinction had been placed merely on the ground that the roads of the appellees are steam railroads, and the appellant road is an electric road, and that therefore the roads are of different characters and serve different purposes, that might have been a tangible distinction, but that involves the proposition that the law does not regulate Interstate Commerce at all if it happens that the instrumentalities engaged in the complete journey are of a different character or mode of transportation, and it involves that if the roads are similar in a certain class of business sought to be regulated, only differing in other respects, then there is the same defect of power.

In regard to the judicial definition of lateral or branch railroads, it may not be inadvisable to call the attention of the court to the fact that in several states there are special statutes authorizing railroads to build branch or lateral roads. In the sense of these statutes, they are parts of one main line, and serve the purpose of supply-

ing what might otherwise be considered as an absence of charter rights after a railroad has once located its main line. The decisions upon these statutes do not attempt to give theoretical definitions of branch or lateral roads, other than this, "A lateral road is but another name for a branch road, and a lateral or branch road is one which proceeds from some point on the main track between its termini, and is an appendage to, and properly a part of the main road." *L. S. & M. Ry. Co.* v. *B. & O. &c. Ry.*, 142 Ill., 272.

In *McAvoy's App.*, 117 Pac., 548, it is said that a branch does not depend on length or direction.

In *Vollmer's App.*, 115 Pa., 166, a branch was twice as long as the main stem.

In *Atlantic & Pac. Roads* v. *St. Louis*, 66 Mo., 28, an extension was built as a branch and upheld.

In *Blanton* v. *R. F. & P. Ry. Co.*, 86 Va., 618, it was held that a branch or lateral road may connect the main line with another road.

In *W., B. & T. Ry. Co.* v. *Camden Con. Oil Co.*, 55 W. Va., 205, it was held that a branch road might be a branch of a branch road.

In *Shoenberger* v. *Mulholland*, 8 Pa. St., 134, the owners of a coal mine had built a road to connect with another line, and it was held to be properly a lateral road, the only characteristic being that it was a common carrier.

That such branches or appendages to a main stem, and owned by it, under the charter and organization, are not the kind of road intended by the Act of Congress, is explained from the wording of the act itself, which applies to any lateral branch line of railroad tendering inter-

state traffic, and provides for a switch connection of any such lateral or branch railroad or private side-track, which may be constructed to connect with the main line of another railroad, where such connection is reasonably practicable, and can be put in with safety, and will furnish sufficient business to justify the construction and maintenance of the same, and such other railroad shall furnish cars for the movements of such traffic to the best of its ability, without discrimination in favor of, or against, any such shipper. These provisions are utterly inapplicable to a branch or lateral road which is simply a part of, and owned by the main line, and already connected with it.

This is further shown by the proceedings taken from the Congressional Record, furnished to the court below by counsel for the appellees.

On May 17th, 1906, pages 72-125 of the Congressional Record, an amendment adopted in the committee of the whole, was concurred in and further amended, and on pages 8158 and 8159, this colloquy between Senators Hale, Spooner and Elkins occurred:

> "Mr. Hale: What is the significance actually and practically, different from a switch of the words 'a lateral railroad?'
>
> "Mr. Spooner: A lateral railroad is built from the side. It may be 20 miles; it may be 10 miles; it may be 50 miles; it may be 100 miles.
>
> "Mr. Hale: But it is an independent line?
>
> "Mr. Spooner: Certainly.
>
> "Mr. Hale: It is only associated with the trunk line by physical connection?
>
> "Mr. Spooner: It is associated with the trunk line in this, that it brings the trunk line business.
>
> "Mr. Hale: It is an independent organization.

"Mr. Spooner: Certainly. It is not a competitor; only a feeder.

"Mr. Hale: It is a feeder?

"Mr. Spooner: That is all.

"Mr. Hale: And it is only associated with the trunk line by its connection which brings business?

"Mr. Spooner: That is all.

"Mr. Elkins: It is a switch connection.

"Mr. Hale: The Senator from West Virginia says it is a switch connection. It is more than that.

"Mr. Elkins: It has to be a switch connection.

"Mr. Spooner: To state it shortly, it is such connection as will enable the transfer of cars from one to the other interchangeably.

"Mr. Hale: But it is not what we commonly understand by a switch connection of short lines of road itself; it is independent.

"Mr. Spooner: It is independent.

"Mr. Hale: It is not a switch connection.

"Mr. Spooner: A firm, a coal company, or a group of independent coal mining companies are unable to get cars, they are unable to obtain switches, they are unable to connect with the line upon which they are dependent to get to market, and they may organize a little company and build 10 miles or 20 miles of railroad. Of course it is a common carrier; it has to be. Constructing that road to a connection with the long line engaged in interstate commerce, there is every reason in the world why, upon fair terms, it should be permitted to connect with that railroad, so as to be able to secure an interchange of traffic and cars on fair terms.

"Mr. Hale: Through transportation.

"Mr. Spooner: Certainly. Now, that is all this is. It will apply and be of great value in respect to coal production; it will apply and be of great value in respect of lumber production, and it will apply and be of great value for very many purposes which I need not take the time to go over. This is very important in many ways to the public, and is perfectly competent for the conferees to agree to."

Perhaps the nearest definition or rather description of what a branch or lateral road is, as the terms are used in the law, is found in the case of *the Interstate Commerce Commission* v. *The Delaware, Lackawanna & Western Railroad Company,* 216 U. S., 531. At page 537 of the opinion in this case, the court says:

> "The question is raised whether the Rahway road is a lateral, branch line of railroad relatively to the appellees. There certainly is force in the contention that the words of the statute mean a railroad naturally tributary to the lines of the common carrier ordered to make the connection, and dependent upon it for an outlet to the markets of the country, which, according to the bill, the Rahway road is not. There is force in the argument that a road already having connection with the roads of two carriers subject to the Act and having joint and through rates with them, can not be regarded as a lateral branch line of railroad of another road situated like the appellee. On the other hand, it would be going far to lay down the universal proposition that feeder might not be a lateral branch road of one line at one end and of another at the other. We leave this doubtful question on one side, because we agree with the Circuit Judges in the considerations upon which they decided the case."

It will be observed that the court treats it as a matter of fact. It was pointed out that the Rahway road was only ten miles long and already had two outlets to the commercial world. It was held that that road was not a feeder of the Delaware road. The plain intimation is that if it were a feeder and especially if it had no other outlet, and shippers along its line had no other resource for the shipment of interstate traffic, then a different result would have followed. For the law was made mainly

for the benefit of the people, and is not the least among these entitled to consideration.

If there be any question at all involved here it is whether the interurban road is a mere parasite or fungus growth? Or on the other hand does it serve a useful purpose in the channels of commerce? Does it feed the larger lines with a business more conveniently for the shipper without any further detriment to those main lines than results from the prevention of monopoly on the part of those lines as to a small portion of the carriage. Does not the Traction Company simply, mainly relieve the shipper from that expensive and onerous burden of getting his goods to the main line? A large question here is whether if the order of the Commission were enforced, it would result in taking business from the complaining lines that otherwise they would get. That ought to be the supreme test of the question whether the traction line is a parallel and competing line. It would be fallacious to suppose that shippers from points along the line of the traction road, no matter what the outcome of this case is, would not continue to ship in that manner by that road in preference to carting their goods a maximum distance of twelve miles over country roads, sometimes almost impassible, in order to deliver it at a station on one of the main lines when the purpose of the traction company is to deliver it to the same lines probably for just as long a haul. Will a system be perpetuated which compels the transaction of a traffic, which will always be the traffic of the traction company, in a manner the most inconvenient and expensive, on some fanciful theory that the roads are of a different kind, when, in the feature which the interstate commerce law concerns it-

self with, they are alike. The fact that the main lines will not get the business naturally going to the traction line except over that line, even if the order of the Commission be nullified, would seem to demonstrate that the traction road is in no sense a parallel or competing line in a legal sense. If the state statutes prohibit the consolidation of competing lines for the purpose of conserving competition, can the prevention of competition, if it exists, be within the purview of the act of Congress? That it is not, is illustrated by those decisions, one by this court, that a forwarder may collect packages from different consignors sufficient to make a carload and get carload rates on the ground that the law is not concerned with the ownership of the contents of the car, and by the principle that a railroad has no claim in law to lessen the natural advantages of any section or locality.

> *Judson on Interstate Com. Law*, page 226, Sec. 184.

See also in this connection

> *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western Railroad Company*, 220 U. S., 235.
> *No. Securities Company* v. *U. S.*, 193 U. S., 197.

If the order of the commission is enforced, it will tend to build up traffic that now does not exist and never will exist for any line. It will cause the location of new industries along the Traction Company's line which will create railroad traffic, and develop and enrich, to a degree, a certain belt of territory which at present is practically "bottled up" and which now has no practicable outlet. If the Act of Congress is broad enough to include

every instrumentality of Interstate Commerce and every kind of railroad,

See *Omaha and Council Bluff's case*, 191 Fed., 40,

And if the meaning of the term railroad in one part of the act is wide enough to include all kinds of railroads, why does not the use of the same term in connection with the words "lateral" and "branch" have as wide a signification and include lateral or branch traction roads?

If the maintenance of competition is the object of state laws against combinations so it is the object of the act of Congress to foster and at least deal, even with competitive roads as they exist, although that competition so far as it exists be stunted for want of that sustenance which its neighbors of larger growth may accord to a small interstate commerce contrivance.

We should rather pay more heed to the Spirit which gives the life than stick in the bark.

Bearing in mind that it is not the office of the commission to either create or stifle competition, but simply to deal with as it exists, and further considering that we can hardly be called a competitor for business that we can only gather up and deliver to them, and if our business increases it does so only by the creation of new business that otherwise would not exist for any one, and that our present business will continue to be carried by our line and delivered to them no matter what the outcome of this suit may be, though in a way very expensive and onerous to shippers and receivers it may not be out of place to quote from a few cases involving competitive lines which seem to hold that competition must be substantial, and not merely incidental and partial, protesting however that it is not the office of the commission to

create or destroy competition but only to deal with a status already created, and to exercise thereon its powers under the law.

In the case of *The Dayton & Union Railway Company* v. *Pittsburg, C., C. & St. L. Railway Company*, 28th Ohio Circuit Court, 705, the court held that:

> "A trackage contract between two railroad companies forming connecting lines, except for a 15-mile parallel track build and operated by one upon the railroad of the other under a contract alleged to be *ultra vires*, is not *ultra vires* when it has for its object the taking up of such parallel track, thereby restoring the company to its former status of a connecting and competing line, and substituting, in lieu of the parallel track, a traffic arrangement which is within the enumerated powers of connecting railroads, and which contract does not destroy, but creates competition between them."

This case was affirmed by the Supreme Court of Ohio, in the 67th Ohio State Report, 523.

In the case of *The Illinois Trust Company* v. *St. Louis, etc., Railroad Company*, 217 Ill., 504, the third and fourth paragraphs of the syllabus read as follows:

> "3. In determining whether a railroad in Illinois, purchased by a foreign corporation, and the original railroads owned by such corporation are parallel or competing lines within the meaning of the act of 1899 (laws of 1899, page 116), the line which the local railroad had power, under its charter, to construct, as well as the portion of the line constructed must be considered.
>
> "4. A foreign and a local railroad are not 'parallel or competing lines' where line of the former between the termini of the latter is much longer and more indirect, requiring a change of cars and ferry-

ing, and where no through trains between those points are run on a foreign railroad, no through business solicited or encouraged and no terminal facilities provided for at one terminus of the local road, and no freight or passenger rates made to compete with the local road or the local competitors of the latter."

In the case of *Burke* v. *C., C., C. & Indianapolis Railroad Company*, 22 W. L. B., 11, at page 14 of its opinion, the court says:

"2. It is urged further that the lines of railway proposed to be consolidated are competing lines and therefore their consolidation would be in violation of the statute and contrary to the policy of the state.

"In the case of *State* v. *Vanderbilt* (37 O. S.), the Supreme Court held that 'the lines of two railroad companies which are in their general features parallel and competing' can not become consolidated into one corporation under Section 3379 of the Revised Statutes. In that case, the two roads, with their leased lines run from Cincinnati, northerly one to Cleveland, and the other to Toledo, and for 60 miles, or from Cincinnati to Dayton, the roads are parallel, and near to each other. These roads (C., C., C. & I. and C., H. & D.), the court found were, in the general features not only parallel, but competing —a fact apparent from the mere statement of the location of the road.

"In the case now before us the Big Four and Bee Line are in no sense parallel—indeed it would be nearer to say that they run at right angles to each other, since the general direction of the Bee line is from the northeast to the southwest, while that of the Big Four is from the southeast to the northwest. Are they competing lines? It is said a reference to the map of the two lines clearly shows that they are. The westerly connection of the 'Bee line' makes southwesterly from Indianapolis to Terra Haute and

St. Louis, while that of the Big Four makes northwesterly to LaFayette and Kankakee. The points reached are widely divergent, and the idea of competition would hardly occur to the popular mind from an inspection of the map, yet it is not to be doubted that there is some competition for through business destined to and from the seaboard and Eastern states, and also for business at points west of Indianapolis, resulting more, perhaps, from crossing and intersecting other lines that serve as feeders than that the two roads in question trend in the same direction or the same commercial centers for we think such is not the case; and while there is incidental competition between these roads as there is between either one of these roads and many others, that might be named, we are disposed to hold that in no proper, legal or commercial sense can they be said to be in 'their general features and from a geographical standpoint, competing lines.' "

In the case of *Railroad* v. *Rushing*, 69 Texas, 313, the court, in its opinion, says:

From page 313:

"If therefore the lines of these two roads do not connect, the sale was unauthorized, because the purchasing company had no power to buy; and if they were parallel or competing lines it was unauthorized because the appellant company had no right to sell. It may be that this court judicially knowing the geography of the state might take notice from the general direction of these two roads as fixed by the statutes under consideration that their lines must necessarily cross each other and therefore could treat them as connecting lines and not parallel to each other. But as to whether they were competing lines, we have no judicial knowledge whatever. Competition between railroads may exist and yet their lines might run parallel but cross each other at some point in their route. Hence when a question as to such

competition is raised the court or jury must have proof upon the subject as in the case of any other fact submitted for its consideration."

It was held in the case of *George Hafer* v. *The C., H. & D. Railroad Company*, 4 Ohio Decisions, 487, that whether lines are competitive does not depend on their being engaged in cutting rates, but on their opportunity from geographical situation to do so, and maybe so though none of the lines reach competing points by arrangement with other lines.

The Empire Trust Company et al v. *Egypt Railway Company*, 182 Fed. Rep., 100, the court at page 104 quotes with approval from *Hancock* v. *Louisville Railroad Company*, 145 U. S., 409, construing a charter empowering a lease, so as to form a continuous line, as follows:

> "It is enough that by the lease the connected roads form a continuous line, and it is not essential that the leased line be an extension from either terminus of the lessee's road. *The evil which was intended to be guarded against by this limitation was the placing of parallel and competing roads under one management*, and the control of one company of the general railroad affairs of the state through the leasing of roads remote from its own, and with which it has no physical and direct connection."

In *Mannington* v. *Hocking Valley Railway Company*, 183 Fed. Rep., 133, the court quotes:

> "The general effect of these consolidations and connections has really been to increase competition, has added greatly to the public convenience, and furnished greater and more commodious facilities for traveling; has operated to reduce the cost of transportation; has brought remote parts of the

country into close proximity, as it were, to each other; has developed resources that would otherwise have remained dormant, by opening up the markets of the world to the products of the land; and has generally contributed to work to the welfare and propriety of the people."

In the case of *Dady* v. *Georgia & A. Railway Company*, 112 Fed. Rep., at page 838, of its opinion, the court says:

"Nor do I attach any importance to the contention that the Georgia & Alabama Railway can not consolidate with the Seaboard Air Line, because there is at present no actual connection with the two roads. The statute upon this subject must have a reasonable construction. The roads are now separated by less than a dozen miles, and it appears that the intervening track is being laid as rapidly as possible.

"Nor, in my judgment, is the consolidation and merger of the two roads contrary to the constitution of Georgia, upon the ground that they are competitive, and because such consolidation might tend to defeat competition and to create monopoly. The Georgia & Alabama and the Florida Central & Peninsular Railways start out from Savannah at right angles to each other. They serve to transport freight and passengers from widely-separated sections of two states. No point on either road can be reached in any reasonable time by a passenger starting out on the other. It is true that they cross one or two shallow rivers on which small steamboats occasionally ply, but there is nothing in the proof or in the contention of counsel to satisfy the court that the occasional delivery of freight by these roads to the steamboats in question could reasonably constitute competitive business, in the meaning of the law, or that, if the roads were under identical control, it would tend to create monopoly. The evidence is that most, if not all, the streams in ques-

tion are spanned by the three powerful roads—the Southern Railway Company, the Central of Georgia, and the Plant System; and, if the merged railroads of the defendants should attempt an injurious monopoly of the traffic on these important navigable streams, one or the other of the three competitors would promptly neutralize the monopoly. It is not difficult to perceive that the contemplated system of the Seaboard Air Line, instead of tending to defeat competition must inevitably tend to preserve it. The new system will contribute to the transportation service of the country now so admirably served by the Plant System and its connecting roads, and by the great and powerful system of the Southern Railway, and by the Central of Georgia Railway. Surely, it needs no argument to justify the statement that three great railroad systems serving the Southern states will do much to prevent and make impossible, rather than to create, monopoly in the railway transportation of these states, and will do much to prevent an injurious control, if any such should be attempted, of the vital functions of the common carrier in a territory which, with all of its expanding interests, promises to be richer than the Empire of Rome under a Caesar or a Trajan."

In the case of *The L. & N. Railroad Company* v. *Kentucky*, 161st U. S., 677, the court in its opinion, says:

"Defendant, however, further urges in support of its assumed rights under the third section of the charter of 1856, a contemporaneous construction by the parties in interest, under which several lines were purchased which ran parallel to some of its own branches, and one of which, known as the Cecilia branch, about fifty miles in length, running substantially parallel to its main line, which it purchased and held for a short time, and then sold to the Chesapeake Co. These, however, were local lines which either ran parallel to the branches of the L. &

N., such as the Owensboro and Nashville, and the Bardstown branch, or an extension of its main line, such as the Louisville, Cincinnati & Lexington, running from Louisville to Cincinnati, or a short line like the Cecilia branch, running parallel to the main line; yet, as the terminus at one end or the other was in most cases different, it can hardly be said that any of these were competing lines, or that their purchase showed such an acquiescense on the part of the state as to estop it from opposing the purchase of a through line from Louisville to Memphis, by the way of Paducah—a line which connects the principal termini of the L. & N. Co. by a road substantially parallel, and no part of which is more than 50 miles from the corresponding part of the L. & N. Putting the broadest construction upon what was actually done, it amounts to no more than that the Company made several purchases of local lines, in which the State acquiesced. That the State may have seen fit in particular cases to ratify the acquisition of local lines parallel to certain branch lines of the main road, does not argue that it intended to approve the purchase of parallel and competing through lines, especially in view of the act of June 22, 1858, which limited the power to consolidate or lease to roads so connected as to form a continuous line. Indeed, these acquisitions appear to have been deemed so little in contravention of the public policy of the State, that the General Assembly did not hesitate to confirm them by special acts, and to receive taxes upon them as part of the L. & N system.

"While the doctrine of contemporaneous construction is doubtless of great value in determining the intentions of parties to an instrument ambiguous upon its face, yet to justify its application to a particular case, such contemporaneous construction must be shown to have been as broad as the exigencies of the case require. In this view we can not say that a contemporaneous construction of this charter, which

ratified the purchase of a few local lines, was sufficient to justify the company in consolidating with a parallel and competing line between its two principal termini, with a view of controlling the through traffic from the lower Mississippi to Cincinnati, and destroying the competition which had previously existed between the two lines. It is possible that the Commonwealth might, if it had seen fit to do so, have enjoined the acquisition of some of these parallel lines, and the fact that it did not deem such purchases to be in contravention of public policy ought not to estop it from setting up an opposition to another purchase, which, in its view, is detrimental to the public interests. As is said by Mr. Justice Cooley, in his Constitutional Limitations (6th Ed.), page 85: 'A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of the constitutional prohibition, without the mischief which the Constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances can not be allowed to sanction a clear infraction of the Constitution.' We are, therefore, of opinion that the Court of Appeals was substantially correct in saying that 'though thirty-eight years since the passage of the act of 1856 and thirty-six years since the act of 1858 had elapsed, when this action was commenced, the L. & N. Co. never before claimed or attempted to exercise the right to purchase and hold parallel and competing lines, except about 1878, when it purchased the road from Louisville to Cecilia Junction, which was held only a short time and then sold to the Chesapeake, Ohio and Southwestern Company..

"That the lines proposed to be consolidated are parallel and competing is evident from an inspection of the map, since both connect the two important cities, Louisville and Memphis, which constitute

their terminis, and are natural competitors for the traffic from the Southwestern to the Northwestern States by way of Cincinnati, as well as that in the opposite direction. The object of the consolidation is obviously to enable the L. & N. to obtain a complete monopoly of all the traffic through the western half of the state. Conceding that that part of the Chesapeake line which ran from Elizabethtown to Paducah was originally a branch line of the L. & N., and might have been acquired as such under section 3 of the act of 1856, it ceased to be such after the Cecilia branch was acquired, and the line was extended from Paducah to Memphis. It then became a parallel and competing line within the meaning of the Constitution."

In *Kimball* v. *F. S. Railroad Company*, 46 Fed. Rep., 888, is the following:

"The view that the court entertains of Section 17, Art. 12, of the Constitution of Missouri, and of Section 2569 of the Revised Statutes of the state, which, as it is claimed, rendered the purchase of stock in the Frisco Company unlawful, may be substantially stated as follows: The prohibition contained in the statute (Section 2569) is clearly aimed at railroad companies 'owning, operating, or managing a railroad in the State of Missouri.' If a railroad company owns, operates, or manages a railroad in this state, it is prohibited, among other things, from leasing, purchasing, or exercising any control over any other railroad in the state that is substantially parallel to, or a competitor of, the road so owned, operated, or managed. This is, in substance, the extent of the statutory inhibition. Now, while conceding for the purposes of the present decision, that the Atchison Company at the time of its purchase managed and operated two railroads in this state, namely, one from Kansas City Northeastwardly through the state to

Chicago, and one from St. Louis to Union, in Franklin County, Mo., a distance of about 60 miles, yet the court concludes that neither of these roads was, in the statutory sense, parallel to, or competitor of, the Frisco. It appears to the court obvious that the road from Kansas City to Chicago can not, in any just sense, be said to be a competing line; in explanation of my ruling that the St. Louis, Kansas City & Colorado Railroad, extending from St. Louis to Union, hereafter called the Colorado Company, was not in the statutory sense a competitor of the Frisco, I will say, that when the statute speaks of competing roads it evidently means roads that are substantial competitors for business; it refers to competition of some practical importance, such as is liable to have an appreciable effect on rates, and in that sense the road to Union was not, in my judgment, a competing line.

"The evidence before me discloses the fact that the Atchison Company had abandoned its purpose of constructing the Colorado road beyond Union before its purchased or determined to purchase the Frisco stock. It shows that the Colorado road and the Frisco do not touch any two common points; that between the two roads, for more than 40 miles, the Missouri Pacific Railroad is interposed; that the Colorado road is in reality a suburban road; and that not more than 1 per cent. of its traffic, which is, in the aggregate, infinitesimal, when compared with the traffic over the Frisco, would in any event, pass over the Frisco. All of these considerations lead me to the conclusion that the Colorado road was not a competing line, within the meaning of the statute, and that the Atchison Company was not disqualified from purchasing the Frisco stock, even though it conceded that it operated and managed the Colorado Road at the time of the purchase."

In the case of *Jacobson* v. *W., M. & P. Ry. Co.*, 74 N. W., 893, it is said:

"Appellant's property is dedicated to public use, 'is affected with a public interest,' and the Legislature certainly has the power to regulate that use in a reasonable manner, unless appellant's charter expressly protects it from such regulation (see *Munn* v. *Illinois*, 94 U. S., 126, *State* v. *Wabash, St. L. & P. Ry. Co.*, 53 Mo., 144; *Alnut* v. *Inglis*, 12 East, 527). Appellant was chartered to serve the public within the scope of its charter powers and franchises, in the best and most efficient manner possible. It was not, as it seems to contend, chartered to obstruct public traffic or serve the public the least that self-interest might dictate. Appellant can not be allowed to obstruct the course of public traffic under the claim that, by putting in this connection and letting such traffic take its course, appellant will lose a large amount of revenue which it would otherwise earn."

Regarding the interchange of cars, the court say:

"Such interchange of cars between different railroads is a common and almost universal practice; it would hardly be contended that such an act of interchange is *ultra vires* on the part of a railroad company, * * * as incidental to the operation of its road, a railroad company has the power to interchange cars with other connecting companies, and this is the ordinary and usual way of doing business. We are clearly of the opinion that the Legislature has the power to compel a common carrier to do business in the usual and ordinary way, and therefore may compel such interchange of cars as incidental to the business for which the company was chartered."

This case was affirmed by the court in 179 U. S., 287.

The power of Congress over subject-matter is plenary. It is not safe to rely upon cases decided under state constitutions for the measure of the powers of Congress. But if the above case directly declares the law of Minnesota,

much more has Congress the power to accomplish the same objects. Has it done so? No doubt, Congress has from time to time endeavored its utmost to deal with the great commercial problem that is over-shadowing everything else. In the first and fifteenth sections especially of the Hepburn Act of 1906, as amended in 1910, the problems of rates, discriminations and in fact of all *practices* or methods of conducting traffic are dealt with amply and exhaustively, one could hardly discover any safeguard that the astuteness of man could devise that has not been provided.

The terms "lateral" "branch" are no more capable of exact definition than are the terms "parallel" and "competitive." It is more a question of description than of definition, more a question of fact than of law. But why attempt to use the latter terms at all in defining the former? The act does not use them. It can not be urged that Congress has to stop when it begins to act upon railroads that could not consolidate under state laws because they were parallel and competitive. There is no question of merger or consolidation involved. The very purpose of those state laws is to keep competition alive; to prevent the companies from stifling it. So it is the purpose, at least one purpose, of the Interstate Commerce Law to leave competition untrammeled and to take no account of it save to consider it as affecting rates. In other words to look upon it as an accomplished fact, as a necessary and beneficial status, and neither encourage nor hinder it, but to deal with traffic problems free from the consideration of it except as a necessary adjunct of all transportation business. Any other view tends toward monoply. There is one view of it that makes it a factor. If a rail-

road should be started at the terminus of another and paralleled it right along through every town until it reached its other terminus for the avowed purpose of destroying the business of the other road, and wrecking and eventually acquiring it, or whether avowed or not, if that were the evident design, the beneficial features of the law might be withheld from such an enterprise. But why? Because the law would then be aiding in the eventual destruction of real, healthful competition, and the scheme would be a fraud, but honest competition is a boon to the public, and the law is made for the public benefit. Its effect is restraining.

See 4 Halbury's Laws of England, page 66, where it is said, "In making an order against a railway company to afford facilities, commissioners will consider chiefly the convenience of the public."

Ever since 1854, there have been in England, laws governing railroad traffic enforced by commissioners, many of the provisions of which may have been adopted into the commerce law of the United States and it is not going too far to say that the principle of the above quotation, is the principle that governs our Interstate Commerce Commission. It neither makes nor unmakes railroads, nor does it inquire into the needs of the community and order the building of railroads. The object of the state laws against consolidation, is to prevent two rival railroads from combining under the same management, and this is for the benefit of the public. So that the object of these state laws and the Interstate Commerce Commission laws are one and the same thing, and therefore it is hard to imagine that because the performance of certain acts by railroad companies would be obnoxious

to these state laws, that that prevents the commission from acting in accordance with its powers to accomplish the very same purpose as these state laws seek to accomplish.

Under the laws of Ohio, the Traction Company and the complaining companies are not competing roads. In fact, they are not competing. A certain part of their business is similar, but their principal business is not to struggle for the same traffic. They have not the same termini; who could imagine that any shipper would cart his stuff from a station on the traction line to the Norfolk & Western road to have it taken to Sardinia and thence to Hillsboro, when he could reach the same point on the traction line in one-third of the distance and in one-tenth of the time. And yet in a way the Southern and Northern Pacific are on certain business competitive. Would it be possible to build an extension or a lateral or branch road that would not in a measure, and at some points, compete with the main line? If a line were built at right angles to another from points ten to fifteen miles away on the lateral line, goods could be carted to other roads, and it would get the business, if the lateral road had never been built. A branch line can not be one that is owned and operated by a main line, for then no compulsion would be necessary. Our lines are not parallel because they touch at a point.

The case of *Puget Sound Electric Ry. Co.* v. *Ry. Com.*, at Wash'n, 117 Pac., 739, between different street railway companies, in the statement of the question of competition, furnishes a principle very much akin to that which arises on the circumstances of this case. In that case it was held that:

"Where the railroad has established rates for a street railroad company, and it does not appear that other lines, operating in a part of the territory covered by its lines, have station facilities at any of the points affected by the established rates, except at one or two places, or that they are seeking to handle the traffic or had time schedules to handle it, and where it appears that people living in territory outside of those places, must travel on the appellant's line or be deprived of direct access by railway into certain towns, such other lines are not 'competing lines'; and hence the order of the commission, reducing rates below the rates permitted to be charged by such other roads, can not be discrimination."

CONCLUSION.

The statement of facts in the record and in the brief of the various counsel, including the briefs of counsel for the Government and the Commission, is so full that it has not been thought necessary to make any fuller statement in this brief for the Traction Company, nor to cite the authorities which the Government has heretofore—and possibly has cited in its brief on the subject of the meaning of a lateral road—but merely to discuss on general principles the question whether the Traction Company's road comes within the wording of the law, even if it be an independent, and to a certain degree, competing line.

Respectfully submitted,

C. B. MATTHEWS,

Attorney for The Cincinnati & Columbus Traction Company.

UNITED STATES, CINCINNATI AND COLUMBUS TRACTION COMPANY, AND INTERSTATE COMMERCE COMMISSION *v.* BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK AND WESTERN RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

No. 648. Argued October 25, 28, 1912.—Decided November 11, 1912.

Under § 7 of the act of June 18, 1910, 36 Stat. 539, 547, c. 309, the Interstate Commerce Commission cannot require a main trunk road to make switch connections with a road which is not actually at the time a lateral branch road.

In this case *held*, that a railroad parallel with a main trunk line and operated by a traction company as an independent venture and not as a mere feeder was not a lateral branch railroad within the meaning of § 7 of the act of June 18, 1910.

An order to maintain through rates incident to a requirement to make switch connections is incidental thereto and falls with it.

Quære whether parties are bound in a higher court by findings based on specific investigations made by the lower tribunal without notice. See *Oregon R. R. Co.* v. *Fairchild*, 224 U. S. 510, 525.

195 Fed. Rep. 962, affirmed.

THE facts, which involve the jurisdiction of the Interstate Commerce Commission to require carriers to establish switch connections, are stated in the opinion.

Mr. Assistant Attorney General Denison, with whom *Mr. Thurlow M. Gordon*, Special Assistant to the Attorney General, was on the brief, for the United States and *Mr. Charles W. Needham* for Interstate Commerce Commission, appellants:

The words "lateral branch line" as used in the American statutes prior to their adoption by Congress would have permitted either of the railroad lines to construct this traction line under charters authorizing their construction of "lateral branch lines." *Newhall* v. *Galena &c. R. R.*, 14 Illinois, 273, 274; *McAboy's Appeal*, 107 Pa. St. 548, 557; *Vollmer* v. *Schuylkill &c. Ry. Co.*, 115 Pa. St. 166; *B. & O. R. R.* v. *Waters*, 105 Maryland, 396; *Greenville & Hudson Ry. Co.* v. *Grey*, 62 N. J. Eq. 768, 770; *Florida &c. R. Co.* v. *Pensacola &c. R. Co.*, 10 Florida, 145, 165, 169; *Blanton* v. *Richmond &c. R. R.*, 86 Virginia, 618; *Wheeling Bridge Co.* v. *Camden Oil Co.*, 35 W. Va. 205; *Howard County* v. *Bank*, 108 U. S. 314.

The purpose of Congress in providing for switch connection with "lateral branch lines" was to provide an outlet for shippers who were dependent upon such outlet for reasonable access to the main arteries of interstate commerce. *I. C. C.* v. *D., L. & W. R. R. Co.* (*Rahway Case*), 216 U. S. 531. So long as the traction line in its dominant and principal character served shippers to whom the track connection was necessary to give them such an outlet into interstate commerce, it was a "lateral branch line" within the meaning of Congress. This conclusion of fact was found by the Commission not only from the geographical situation but from the commercial and industrial situation and the distribution of the population.

The order did not lack the technical prerequisites as to proper parties and prior formal request in writing. Act to Regulate Commerce, § 13, as amended June 18, 1910.

The order is not invalid because it did not require the Traction Company to furnish security for the expense of installing the switch connection. *Wisconsin &c. R. R.* v. *Jacobson*, 179 U. S. 287, 302; *State* v. *Chi., M. & St. P. Ry. Co.*, 115 Minnesota, 51, 53; *State* v. *C., B. & Q. R. R.*, 85 Kansas, 649; *O. R. & N. Co.* v. *Fairchild*, 224 U. S. 510.

The order compelling through routes was constitutional and within the Commission's statutory power. Act to Regulate Commerce, § 15; *Burlington &c. Ry.* v. *Dey*, 82 Iowa, 312, 338; *State* v. *Minn. & St. L. R. Co.*, 80 Minnesota, 191, 196; *Jacobson* v. *Wis. &c. Ry.*, 71 Minnesota, 519.

Neither the order nor the act required the petitioners to send their own cars beyond their own rails. *Central Stock Yards* v. *L. & N. R. R. Co.*, 192 U. S. 568, 571; *Burlington &c. Ry.* v. *Dey, supra;* 82 Iowa, 312, 338; *Rae* v. *Grand Trunk R. Co.*, 14 Fed. Rep. 401; *Mackin* v. *B. & A. R. Co.*, 135 Massachusetts, 201, 206; *Peoria &c. Ry.* v. *C., R. I. & P. R. Co.*, 109 Illinois, 35; *Hudson Valley Ry.* v. *B. & M. R. Co.*, 106 App. Div. (N. Y.) 375; *Mich. Cent. R. Co.* v. *Smithson*, 45 Michigan, 212; Service Companies, §§ 529, 530; *Mo. Pac. R. R.* v. *Larrabie Mills*, 211 U. S. 612; *Penn. Ref. Co.* v. *West N. Y. & P. R. Co.*, 208 U. S. 208, 222; *Cent. Stock Yards* v. *L. & N. Ry.*, 192 U. S. 568, 572.

The order is not void because, as to the physical condition of the Traction Company's line, the Commission supplemented the testimony of witnesses by independent investigation. This independent investigation was justified on the same ground as supports the right of a jury to "view" the subject-matter in controversy. *Cederberg* v. *Robison*, 100 California, 93; Sutherland on Damages, § 441, note, 1; Wigmore on Evidence, §§ 1150, 1168; *People* v. *D. & H. Canal Co.*, 165 N. Y. 362, 365.

However, judicial analogy should not control because of the importance of the Commission's administrative functions. *I. C. C.* v. *Baird*, 194 U. S. 25; *Boston Fruit & Produce Exchange* v. *N. Y. &c. R. Co.*, 4 I. C. C. Rep. 664, 678; Daish on Procedure before the I. C. C., §§ 137, 132, 136, 144; *M. & K. Shippers Assn.* v. *M., K. & T. Ry. Co.*, 12 I. C. C. Rep. 483, 484; *Origet* v. *Hedden*, 155 U. S. 228, 237; *Tang Tun* v. *Edsell*, 223 U. S. 673, 677; *Oceanic Steam Nav. Co.* v. *Stranahan*, 214 U. S. 320, 342; *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177; *Public Clearing House* v. *Coyne*, 194 U. S. 497; *West* v. *Hitchcock*, 205 U. S. 80; *Davidson* v. *New Orleans*, 96 U. S. 97.

In determining questions of fact arising under the Act to Regulate Commerce, the conclusions of the Commission are final and not reviewable by the Commerce Court. *Balt. & Ohio R. R.* v. *Pitcairn*, 215 U. S. 481; *Int. Com. Comm.* v. *D., L. & W. R. R. Co.*, 220 U. S. 235, 251.

Mr. R. Walton Moore, *Mr. Edward Barton* and *Mr. Theodore W. Reath*, with whom *Mr. Joseph I. Doran* and *Mr. F. Markoe Rivinus* were on the brief, for appellees.

Mr. C. B. Matthews filed a brief for the appellant, Cincinnati & Columbus Traction Company.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit to set aside an order of the Interstate Commerce Commission directing the appellees to establish switch connections with the road of the appellant and also through routes to and from points on that road.

20 I. C. C. Rep. 486. The Commerce Court made a decree as prayed, 195 Fed. Rep. 962, and an appeal was taken to this court. The facts material to our decision are as follows. The Baltimore and Ohio Southwestern Railroad and the Norfolk and Western Railway are trunk lines of steam railroads running east and west across the State of Ohio. After almost touching each other at Norwood, a suburb of Cincinnati, they draw apart, the former in a northerly, the latter in a southerly direction, but come together again at Hillsboro about fifty-three miles further to the east. The line of the Traction Company is an 'interurban' electric railway, for passengers and some freight, running under a state charter between Norwood and Hillsboro through the middle of the diamond enclosed by the steam roads, and authorized to go on to Columbus. For a number of miles easterly from Norwood to Stonelick, near Boston, the last mentioned road is very near and almost parallel to the tracks of one or the other of the steam roads, as it is again for the last five miles before reaching Hillsboro. In the intervening space, between Boston and Dodsonville, the towns and villages on the electric line are from five to ten or twelve miles by wagon distant from the nearest station on one of the steam roads. The Traction Company applied to the Commission for switch connections and they were ordered as we have said.

Some technical objections were raised, but the substantial question is whether the Traction Company is a "lateral, branch line of railroad" within the meaning of the first section of the Act to Regulate Commerce, amended by act of June 18, 1910, c. 309, § 7, 36 Stat. 539, 547. That section requires carriers subject to the act to establish switch connections with such lines on certain conditions; and, as amended, permits owners of such lines as well as shippers to make complaint to the Commission in case of the carriers' failure upon written application, and authorizes the Commission to hear, investigate and

determine whether the conditions exist, and to make an order directing the carrier to comply with the act. It will be seen without much argument that, unless the Traction Company is a lateral, branch line of railroad, the trunk line carriers, the appellees, are not subject to the requirement of the statute, so far as the Traction Company is concerned.

The words 'lateral, branch line' do not refer to what the applicant may become or be made by order of the Commission but to what it already is when it applies. The power of the Commission does not extend to ordering a connection wherever it sees fit, but is limited to a certain and somewhat narrow class of lines. The most obvious examples of such lines are those that are dependent upon and incident to the main line—feeders, such as may be built from mines or forests to bring coal, ore or lumber to the main line for shipment. We agree with the Commerce Court that the Traction Company is not within this class. It is an independent venture, in its general course parallel to, more or less competing with, the steam roads and working on a different plan. Presumably and so far as appears it was built and would have been run without regard to the existence of the steam roads. The cases cited on behalf of the appellants as to the power of railroad companies to construct branch roads under their charter do not apply. There the determination of the company fixes the character of the branch; it builds the branch from the beginning as incident to the purposes of the company. But here, as we have said, this determination of the Commission that the applicants shall be a branch is not enough; the applicant must be a branch before it applies. That is the absolute and reasonable condition. That some shippers would be accommodated by a switch connection is not enough.

The order to maintain through routes was incident to the requirement of switch connections and falls with it.

We understand that it was based on the assumption that the connections were to be made, and therefore do not go into the question of power under § 15.

It is unnecessary to consider objections to the conclusion of the Commission that it was safe and reasonably practicable, &c., to establish the switch. We remark that it is stated in the Commission's report that they base their conclusion more largely upon their own investigation than upon the testimony of the witnesses. It would be a very strong proposition to say that the parties were bound in the higher courts by a finding based on specific investigations made in the case without notice to them. See *Washington, ex rel. Oregon R. R. & Nav. Co.* v. *Fairchild*, 224 U. S. 510, 525. Such an investigation is quite different from a view by a jury taken with notice and subject to the order of a court, and different again from the question of the right of the Commission to take notice of results reached by it in other cases, when its doing so is made to appear in the record and the facts thus noticed are specified, so that matters of law are saved.

Decree affirmed.